62 Am Jur 2d Powers of Appointment and Alienation Summary

Powers of Appointment and Alienation Summary

Scope:
This article discusses powers of appointment and alienation, with general discussion regarding definitions of, the nature of, and distinctions of such powers with, other concepts. The article also discusses classifications or types of powers, governing law, the creation, construction, and interpretation of such powers, the duration, termination, extinguishment, and amendment of such powers, and contracts to appoint. The exercise of powers is discussed, with specific discussion as to such matters as the capacity of a donee to appoint, persons who may or must exercise a power, instruments executing a power, persons appointed, and the effect of the exercise of a power. Further examined are rights and liabilities of appointees or objects, disclaimer, renunciation, relinquishment, or transfer of powers, and rights and liabilities of purchasers, as well as rights and remedies of creditors and spouses of donees.

1 Powers, generally

A power over property is defined as a liberty or authority reserved by, or limited to, a person to dispose of real or personal property for his or her own benefit or for the benefit of others. A power is a liberty or an authority which operates upon a vested estate or a vested interest, not being derived out of such estate or interest, but overreaching or superseding it. A power has to do with property, but it is not property and it is not an interest in property.

Observation: A "right" is a power or privilege to which one is entitled. Such an entitlement does not preclude the delegation of that power or privilege to another.

2 Powers of appointment

A power of appointment has been defined simply as a power to dispose of property by deed or will, or the power to dispose of property vested in another. In other words, a power of appointment is created when one person, the donor, grants another person, the donee, the authority to designate the beneficiaries of the donor's property. More detailed definitions of the term include --

-- a power given by the donor of property to the donee, which enables the donee to designate the appointees or persons who are to take the property at some future time, or the shares which they are to receive.
-- a power of disposition given to a person over property not his or her own, by someone who directs the mode in which that power shall be exercised by a particular instrument.
-- a power or authority given to a person to dispose of property, or an interest therein, which is vested in a person other than the donee of the power.
-- authority to do an act which the owner granting the power might himself or herself lawfully perform.

Other courts follow the definition given by the Restatement Second, Property (Donative Transfers).

However, while the term may be defined differently by various courts, the essence of a power of appointment is to give the donee the power to cause some person to receive less of the subject property and another person to receive more. A limited power of appointment constitutes recognition of the donor's right to dispose of property as he or she sees fit through the selection of a conduit.[n12] Indeed, the general purposes of a power of appointment are to control wealth and provide flexibility in an estate.

Observation: Powers of appointment have been held to be alien to Louisiana's civil law traditions, and they are therefore not recognized in that state.

3 Restatement definition

A power of appointment is defined in the Restatement Second, Property as authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.

Comment: The term "power of appointment" as used in the Restatement comprises all powers permitting the powerholder to determine who will be entitled to beneficial interests in the property subject to the power and the extent of the beneficial interests that may be received. The term is used inclusively to cover situations where --
-- the power is held in a fiduciary or non-fiduciary capacity.
-- the power is presently exercisable by the powerholder or exercisable only in the future, such as by the power-holder's will.
-- the powerholder is the creator of the power or one who is not the creator of the power.
-- there are multiple powerholders who must act jointly or a single powerholder.
-- the persons in whose favor the power may be exercised are unlimited or are limited.
-- the beneficial interests created in the persons in whose favor the power may be exercised are unlimited or limited.

4 Statutory provisions

State statutes may abolish powers as they existed at common law and establish a complete and exhaustive codification of the law under which powers are to be created, governed and construed. State statutes may apply to personal property as well as to real property. If the statute existing at the time of the creation of a power of appointment and the statute existing at the time of the exercise of the power or at the time of the assertion of a right given by the statute differ, the law existing at the time of the exercise or assertion of the right controls.

Observation: The repeal of a statute by which the preexisting common law right to make a power of appointment was carried into state law has the effect of reinstating the preexisting common law rule if not constitutionally repugnant.

5 Generally

When an individual grants a power of appointment --

-- the person granting, creating or conferring the power, such as testator through a will, is the "donor."
-- the person who receives the power or who is granted the right to exercise the power is called the "donee."
-- those who receive property from the donee are "appointees."

6 Restatement definitions identifying various persons

The Restatement Second, Property defines certain terms identifying various persons related to a power of appointment, as follows:

.the donor is the person who brings the power of appointment into existence
.the donee is the powerholder
.the objects are the persons to whom an appointment can be made
.the appointees are the persons to whom an appointment has been made
.the takers in default of appointment are the persons whose interests in property, expressed or implied, are subject to a power of appointment and who take the property to the extent the power is not effectively exercised

7 Restatement definitions identifying property interests

The Restatement Second, Property defines various terms which identify the property interests related to a power of appointment, such as:

.the appointive assets are the assets subject to a power of appointment
.the appointive interests are the sum of the interests that a power of appointment creates in appointive assets
.the donee's owned interests are the donee's beneficial interests in appointive assets, other than as an object of the power of appointment

8 Nature as agency or trust

A power is akin to an agency, the donee being no more than a designated agent with limited authority. It is in the nature of, or similar to, a trust, although a trust is generally distinguishable from a power. However, there is authority that a power of sale is a trust.

9 Nature as property or estate

Like powers generally, a power of appointment is not property or a property right, even though it concerns property. Rather, it is a mere right or power, a personal privilege, or personal authority. A power of appointment is not an estate, for it has none of the elements of an estate.

It is generally held that the authority given to the donee of a power of appointment does not vest in the donee any estate, interest, or title in the property which is the subject of the power.[n8] Property that passes by a power of appointment generally belongs to the donor of the power and not to the donee. The appointee of the power takes through a transfer from the donor rather than the donee, who, in exercising the power, acts as a mere conduit or agent for the donor. Nor does the donee of a power of appointment have sufficient interest in the property covered thereby to dispose of it, except in accordance with the power.

Comment: The beneficial owner of an interest in property ordinarily has the power to transfer to others beneficial rights in the owned interest. This power is an incident of the owned interest and the transfer is directly from the owner to the beneficiary of the transfer. A power, however, is the authority to designate beneficial interests in property other than as an incident of the beneficial ownership of the property. When the power is exercised, it is the completion of the terms of a transfer that started with the creator of the power.

On the other hand, some authority holds that a general power of appointment may be considered as a property interest in the donee of the power depending on the facts of the case and the purpose for which the power is evaluated. Indeed, some authority describes a general power of appointment as equivalent to a grant of absolute ownership. Courts may also treat the holder of power of appointment in tax law as an owner. It has also been observed that a general power of appointment means that an interest in the property passes to the donee at the donor's death, while a limited power of appointment means that an interest in the property passes not to the donee, but rather, to a specific class of beneficiaries at the donor's death.

10 Distinctions from power of sale

The essence of a power of appointment is that the donee has the power to cause some person to receive less property and another person to receive more. On the other hand, a power of sale merely permits the powerholder to substitute money for the property sold, but does not permit the holder of the power of sale to alter the beneficial interests in the substituted value. Thus, a power of sale is not a power of appointment as defined by the Restatement Second, Property or as recognized by the courts.

A power of sale is a trust. It does not include the right to make a gift, and hence is more restrictive than a general

power of disposition. A power of appointment is dispositive in nature, while a power of sale is administrative in nature.

Comment: The power of sale may encompass a power to invest the proceeds of the sale, as is the case with a trustee who sells and reinvests. Even though existing beneficial interests in property may be affected to some extent by a change in the investment portfolio in which such beneficial interests exist, the obligation imposed on a trustee in carrying out an investment program is to be fair to all trust beneficiaries. This prevents a power of sale and reinvestment in a trustee from being a power to designate beneficial interests in property, and hence such power is not a power of appointment.

11 Distinctions from power of attorney

A power of attorney creates the relationship of principal and agent between the one who gives the power and the one who holds the power. This relationship is generally terminated by the death of the principal and may be terminated (depending on controlling local law) by the incompetency of the principal. A power of appointment does not create an agency relationship between the creator of the power and the powerholder, and a power of appointment may be created that is exercisable after the death of the creator of the power.

The holder of a power of attorney is exercising for the present owner of property, as the owner's agent, one or more of the incidents of ownership of the property of such owner. By contrast, the holder of a power of appointment is completing the terms of a disposition made by a transferor.

12 Generally

Powers are ordinarily categorized as either general or special. The basic distinction between general and limited powers of appointment is the difference in the extent of dispositive power over the appointive property.

Observation: Ordinarily, the mode of execution of a power of appointment does not affect its classification as a general or a special power. However, the general rule is that a power exercisable by will only is still a general power, and that a power becomes limited only when the appointees are limited. There is some difference of opinion, however, as to whether general powers include powers exercisable only by will, so that the donee cannot appoint himself or herself although he or she can appoint his or her estate.

13 General powers

A "general power of appointment" exists if the donee may exercise it in favor of any one he or she chooses, including the donee himself or herself, or his or her estate or creditors. In other words, a general power of appointment confers upon its holder the unfettered right to determine the appointees or ultimate recipients of the property subject to the power and the amount which each person shall receive. It is a power upon which no restrictions are imposed.

Caution: For federal estate or gift tax purposes, the definition of a general power of appointment is exclusively statutory, and the classification or nomenclature under local law or the governing instrument is not relevant.

14 Special or limited powers

Limited powers of appointment constitute recognition of a donor's right to dispose of his or her property as the donor sees fit through the selection of a conduit, the donee. A donor may impose particular conditions and requirements, or place limitations, on the power or the exercise of the power. Thus, a "specific" or "special" power

of appointment exists if the donee may exercise it only in favor of a particular person or class of persons.

For example, a special or limited power exists when --

-- the donee must exercise the power in favor of an appointee other than himself or herself or his or her estate.
-- the donee may exercise the power in favor of any beneficiaries except those specifically excluded.
-- the donee may exercise the power only for certain named purposes, or under certain conditions.

Special powers may be further classified as exclusive or nonexclusive.

When limitations or restrictions are set, the donee must comply with the limitations, and a valid exercise of the power depends upon compliance with the conditions and requirements.

15 Nature and characteristics

It has been stated that a general power is equivalent to a grant of absolute ownership, and that the donee of a general power of appointment, where the power is presently exercisable, is effectively the beneficial owner of the property subject to the power. Other authority, however, has also been stated that a general power of appointment conferred upon a life tenant does not enlarge his or her estate into a fee simple, nor may he or she enter into any contract that fetters the exercise of the power.

It has been held that a donee may hold a general power but still not have the power to appoint the remainder at his or her death or give away the property during his or her lifetime. Other authority holds that a general power of appointment means that an interest in the property passes to the donee at the donor's death, while a limited power of appointment means that an interest in the property passes not to the donee, but to a specific class of beneficiaries at the donor's death.

FOOTNOTES:

n1 Ellis v. U.S., 280 F. Supp. 786 (D. Md. 1968); Estate of Thorndike, 90 Cal. App. 3d 468, 153 Cal. Rptr. 487 (1st Dist. 1979).

As to the rule that a power of appointment is neither property nor a property right, see § 9.

n2 Estate of Stewart, 325 Pa. Super. 545, 473 A.2d 572 (1984), order aff'd, 506 Pa. 336, 485 A.2d 391 (1984).

n3 Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969); Grohn v. Marquardt, 487 S.W.2d 214 (Tex. Civ. App. San Antonio 1972), writ refused n.r.e., (Mar. 7, 1973).

n4 U. S. v. Baldwin, 283 Md. 586, 391 A.2d 844 (1978).

n5 Estate of McKenna, 118 Cal. App. 3d 66, 174 Cal. Rptr. 84 (1st Dist. 1981).

n6 § 9.

REFERENCE: West's Key Number Digest, Powers [westkey]1, 5
West's A.L.R. Digest, Powers [westkey]1, 5
A.L.R. Index, Power of Appointment and Alienation
A.L.R. Index, Power of Sale
Am. Jur. Legal Forms 2d, Trusts §§ 251:528, 251:529
Restatement Second, Property (Donative Transfers) § 11.4
West's Key Number Digest, Powers [westkey]1, 5

American Jurisprudence, Second Edition

Laura Dietz, J.D., and Jeffrey J. Shampo, J.D.

16 Discretionary or coupled with duty

A special power may be discretionary or it may be coupled with a duty. A special power is discretionary if its exercise or nonexercise depends wholly on the volition of the grantee. A special power is coupled with a trust duty when its exercise is obligatory on the grantee.

A general power of appointment cannot be coupled with a trust, since it is inherent in the nature of a power coupled with a trust that the trust duty be enforceable by the potential appointees. If potential appointees include the whole world, no one has a right to enforce the power, and the effective exercise or nonexercise of a general power depends solely on the will or caprice of the grantee.

17 Restatement classifications

The Restatement Second, Property classifies powers of appointment as general and nongeneral. A power of appointment is general if it is exercisable in favor of any one or more of the following --

-- the donee of the power.
-- the donee's creditors.
-- the donee's estate.
-- the creditors of the donee's estate.

Any other power of appointment is a non-general one. However, a non-general power of appointment may be so inclusive as to the objects of the power that the only persons excluded are the donee, the donee's creditors, the donee's estate, and the creditors of the donee's estate.

Comment: A general power of appointment gives the donee of the power the authority to confer on himself or herself the full benefit of the appointive assets to the exclusion of others. If this authority must be exercised jointly with another, even though the joint donee may have an interest in the appointive assets adverse to the exercise of the power in favor of the donee who can be benefited by the exercise of the power, that fact does not prevent the power from being a general one. It may, however, result in some different legal consequences than those that apply when the donee, acting alone, can exercise the general power of appointment. A power that is exercisable in favor of the donee if a specified standard is met is a general power of appointment that is presently exercisable only when the standard is met.

18 Collateral powers versus powers coupled with interest

The donee of a power of appointment need not have any estate or beneficial interest in the property subject to the power in order to validly exercise that power. Indeed, a power of appointment may be referred to as a collateral power, which is an authority to deal with an estate where no interest in the estate is vested in the donee of the power. Stated another way, a power is simply collateral and without interest when authority is given to a mere stranger to dispose of an interest in which he or she has or acquires no estate.

A power to sell or dispose of personalty may be coupled with an interest where, for example, it is given to an agent

as security. However, a mere power of attorney authorizing the holder to collect a debt or settle a claim for another is not a power coupled with an interest, even though the donee is authorized to deduct his or her charges from any money collected, though there is contrary authority. Nor is a contract giving authority to sell property on commission for a share of the proceeds a power coupled with an interest.

19 Powers in gross

A power in gross is a power of appointment where the donee has an owned interest in the appointive assets separate from the donee's power of appointment. Where the holder of a power of appointment also holds a life estate in the property involved, the power is one in gross.

20 Discretionary and imperative powers

A power is discretionary if its exercise or nonexercise depends wholly on the volition of the grantee. Should a donee fail to exercise an imperative power, the court will do so.

Ordinarily, the exercise of a power by the donee is purely discretionary or permissive and not imperative, and no court can compel or control the donee's discretion or exercise its discretion for it if for any reason it left the power unexecuted. Thus, the distinction between powers and trusts is marked and obvious, since trusts are always imperative in that they must be performed.

Observation: Courts do not favor an absolute or arbitrary discretionary power unless it is clear that it was the intention of the testator to confer it. However, a testator has the right to confer such power if he or she sees fit to do so.

21 Beneficial and trust powers

Definition: A beneficial power has been defined by statute as one that has for its object the grantee of the power, and is executed solely for his or her benefit.

In general, a power is one in trust when the subject of the power is certain, when the objects are certain, and when the power is imperative.

22 Powers presently exercisable and powers not presently exercisable

The Restatement Second, Property classifies powers of appointment as those presently exercisable and those not presently exercisable. Thus, a power of appointment, whether general or non-general, is presently exercisable if the donee at the time in question by an exercise of the power can create an interest, present or future, in an object of the power. A power of appointment, whether general or nongeneral, is not presently exercisable if it is exercisable only by the donee's will or, at the time in question, is not exercisable until the occurrence of some event or the passage of a specified period of time.

One court has said that a power is presently exercisable if the donee of the power may exercise it by inter vivos conveyance as well as by testamentary conveyance. It has also been stated that the donee of a general power of appointment, where the power is presently exercisable, is effectively the beneficial owner of the property subject to the power.

Comment: A power of appointment must come into existence before the issue of whether it is presently exercisable or not presently exercisable can be determined. A power of appointment that is set forth in the will of a living person is not in existence because such person's will is not legally operative during the lifetime of such person. A power of appointment is presently exercisable even though at the time in question, the donee can only create an interest in an object of the power that is revocable or is subject to a condition.
Observation: A general power of appointment vests when it becomes exercisable. If the power is presently exercisable, it is presently vested.

23 Personal or official powers of sale

If a will confers a power of sale, coupled with a discretion to sell or not as the donee of the power sees fit, the power is personal. If the power conferred by the will is absolute and unconditional and the testator directs a positive and peremptory sale of the property, the power is official. A personal power survives the final administration of the estate and continues until the trust is executed or until the donee of the power has had a reasonable time within which to execute the trust. Sales made in the exercise of a personal power need not be authorized or approved by the probate court.

24 Generally

Generally, the validity, construction, and effect of the exercise of a power of appointment as to personalty or movables is governed by the law of the domicil of the donor of the power, at the time of creation of the power, and not by the law of the donee's domicil. This rule is based on the fact that in exercising the power, the donee is disposing of the estate as that of the donor. However, it is not necessary for the will of the donee of the power to be probated in the donor's domiciliary state.

Observation: It has been stated that a general power of appointment is not subject to the principle of comity, either as to creation or interpretation. However, there is authority holding that the decision of another court regarding whether a power of appointment was validly and effectively exercised was properly accorded comity so that the issue may not be relitigated.

The applicable law in point of time with respect to whether a power of appointment was validly exercised is discussed elsewhere in this article.

25 Particular issues governed by the law of the domicil

The rule that the domicil of the donor governs the exercise of the power by the donee has been applied in connection with questions as to the essential validity and effect of the provisions of the appointing instrument executing the power, and the construction of the appointing instrument. The law of the domicil has also been held to govern other miscellaneous matters, such as --

-- the right of appointees to elect to take under appointment of the donee, or under the will of the donor as beneficiaries upon default of appointment.
-- the capacity of the donee to exercise the power.
-- a release of the power by the donee.
-- a revocation of the appointment.

26 Intent of donor

In the determination of the nature and extent of an interest resulting from the exercise of the power of appointment,

the general rule that the validity and effect of an instrument creating a power of appointment of personal property is to be determined by the law of the domicil of the donor does not apply where the manifest intent of the donor was that the will creating the power of appointment was to be governed by the law of the domicil of the appointee. Further, where the instrument creating the power is silent as to what law shall govern its construction -- but the surrounding circumstances, as well as the provisions of the instrument, indicate an intention or require the implication that the parties intended that the law of a particular state control -- the court will effectuate that intention. In other words, the question of what law is to determine the legality of the interests undertaken to be created by a power which the donee assumed to exercise is to be answered in the light of the intent of the donor of the power. Where such intent was not expressed in the instrument which created the power, it is to be gathered from the facts and circumstances.

27 Creation of power by trust or will

When a power is created by will, the law of the donor's domicil at the time of his or her death applies. When the power was created by inter vivos disposition the law of the jurisdiction which the donor of the power intended to govern such disposition applies.

Observation: Where the trust instrument creating the power contains no express indication of the donor's intent, the applicable law has been held to be the law of the jurisdiction having the most significant contacts with the trust. However, a different rule may be recognized when the donee exercises the power by his or her will.

28 Exercise of power by donee's will

It has been held that where the power is created in a trust agreement, a donee's will exercising the power will be construed under the law governing the administration of the trust, which is usually the law of the donor's domicil.

Other authority holds that the determination of whether a testamentary special power of appointment conferred by a trust has been effectively exercised by the donee's will is governed by the law of the jurisdiction where the donee was domiciled at the time of the power's purported execution, rather than the domicil of the donor. Similarly, when the donor is silent with respect to what law controls the question of the exercise of a power, a federal court has held it is logical to conclude that the law of the domicil of the donee at his or her death should apply to interpreting the donee's will for all purposes, including whether or not the a power of appointment was exercised therein.

29 Powers relating to realty

Insofar as a power of appointment affects real property, it is generally conceded that all questions relating to the manner or sufficiency of the donee's execution of the power are to be determined by the law of the situs of the real property.

30 Selection of applicable law by donor

Where a will or trust indenture contains a provision that all questions pertaining to its validity, construction and administration are to be determined in accordance with the laws of a specified state, the validity of the exercise of a power of appointment created in such instrument is governed by the laws of that state.

31 Generally; purposes of creation

A power may be created for any lawful purpose and to do any act which the grantor might himself or herself do, in the absence of any statute providing otherwise.

The exercise of a power of appointment is a common way of controlling wealth. The recognized practical purpose or use of powers of appointment in testamentary dispositions is to provide flexibility in an estate so as to allow for change of conditions which may occur after the death of the owner of the property. It has become a popular estate planning technique for an owner of property to grant to the spouse a life interest and a general power of appointment in order to qualify for the marital deduction under the federal estate tax laws, but to limit the manner in which it can be exercised.

32 Instrument creating power

A power of appointment may be created by deed or will, or by inter vivos disposition. A testator may, by testamentary instrument, authorize a designated person to confer a power of appointment. The date of creation of a power of appointment ordinarily is the effective date of the instrument creating it.

33 Subject property

Both real and personal property may be subjected to a power of appointment, as may be community property.

34 Creation by implication

A few cases state that a power of appointment is never created by implication or by operation of law, but only by a deliberate act. However, other cases support the view that a power of appointment may be created by implication, where it appears from the instrument in question that the power was intended to be created. Similarly, the Restatement Second, Property contemplates that a power of appointment may be created by implication as a result of a transfer of property. However, the creation of a power of appointment will not be implied except from clear and unequivocal language.

35 Power of sale

Where, in order to carry out a trust, a power of sale is essential, such a power will be implied although not expressly given. Similarly, an implied power of sale in the executor arises if it is necessary to carry out the other terms of the will. Further, if a testator gives all of his property to his wife "to be used by her during her natural life," the wife may be considered to have an implied power of disposal of the property as necessary for her reasonable and comfortable support.

However, although a power to sell real estate will be implied in a will when to do so is necessary to carry out the testator's apparent intent, mere naked trusteeship will not confer power of sale by implication.

36 Generally

To create a valid power of appointment, the donor must --

-- intend to create a power.
-- indicate by whom the power is held.
-- specify the property over which the power is to be exercised.

It is also essential that the object or objects to be benefited by execution of the power be specified or clearly ascertainable.

Observation: A statute may excuse compliance with the formal requirements of a power of appointment or may dispense with procedural formalities in the execution of the document, but that does not alter the rule that a donor may place limitations upon the scope and extent of the power that are controlling.

It has been held that the donor and donee of a power of appointment cannot be the same person, because one cannot be the owner of an interest in property and also the donee of a power to appoint that interest; any lesser estate would merge into the fee simple estate. However, other authority seems to suggest that a donee and donor may be the same person, and a trust settlor may reserve to himself or herself a power of appointment to be exercised by his or her own will at a later time.

FOOTNOTES:

n1 Matter of Estate of Krokowsky, 182 Ariz. 277, 896 P.2d 247 (1995); Matter of Estate of Lewis, 738 P.2d 617 (Utah 1987); Estate of Sieber v. Oklahoma Tax Com'n, 2002 OK CIV APP 25, 41 P.3d 1038 (Div. 4 2001).

As to intent to create power, generally, see § 36, 37.

n2 § 40.

n3 Crook v. Contreras, 95 Cal. App. 4th 1194, 116 Cal. Rptr. 2d 319 (6th Dist. 2002).

n4 In re Allen A. Atwood Trust, 2001 OK CIV APP 49, 23 P.3d 309 (Div. 4 2001).

n5 In re Allen A. Atwood Trust, 2001 OK CIV APP 49, 23 P.3d 309 (Div. 4 2001).

As to special or limited powers of appointment, generally, see § 14.

n6 Niemann v. Zacharias, 185 Neb. 450, 176 N.W.2d 671 (1970).

As to the definition of power of appointment as the power to dispose of property vested in or owned by another generally, see § 2.

n7 Niemann v. Zacharias, 185 Neb. 450, 176 N.W.2d 671 (1970).

n8 U. S. v. Baldwin, 283 Md. 586, 391 A.2d 844 (1978).

n9 DiSesa v. Hickey, 160 Conn. 250, 278 A.2d 785 (1971).

REFERENCE: West's Key Number Digest, Powers [westkey]4 to 11, 23
West's A.L.R. Digest, Powers [westkey]4 to 10, 23
A.L.R. Index, Power of Appointment and Alienation
A.L.R. Index, Power of Sale
Am. Jur. Legal Forms 2d, Trusts § 251:512
Restatement Second, Property (Donative Transfers) §§ 12.1, 12.3
West's Key Number Digest, Powers [westkey]4 to 11
Power of appointment. Am. Jur. Legal Forms 2d, Trusts § 251:512

American Jurisprudence, Second Edition

Laura Dietz, J.D., and Jeffrey J. Shampo, J.D.
Powers of Appointment and Alienation
IV. Creation
B. Requisites for Valid Creation
62 Am Jur 2d Powers of Appointment and Alienation § 37

37 Intent to create power; particular language used

When the intention to create a power is plain it should be given effect. A power of appointment will be upheld where the donor's intent to establish a power is unambiguously expressed. Under the Restatement Second, Property, a transfer creates a power of appointment if the transferor manifests an intent that it shall do so and if the transfer is otherwise effective.

The manifestation of such intent does not require any technical, special, or particular form of words to create a power, especially when the instrument being construed is lay-drawn. Indeed, it is not even necessary that the actual words "power of appointment" or "appoint" be used in order to create such a power. Any expression, however informal, which clearly indicates an intention to give or reserve a power, is sufficient.

Caution: Although no particular words are necessary to create a power of appointment, there are limitations on the degree of ambiguity that will be tolerated when ruling whether or not such a power exists. For example, a court has held that no power of appointment is created by the testator's will when --
-- the term "power of appointment" is not mentioned.
-- the requisites of a power of appointment are not described.
-- no language in the will attempts to delimit the bequest in question by any ascertainable standard such as necessary support and maintenance. Careful drafting of a dispositive instrument in which the transferor intends to create a power of appointment will result in the use of language that leaves no doubt as to the transferor's intent.

To create a general power of appointment, the donor must employ language specifically authorizing the donee to appoint property to his or her estate or creditors, even where the donor and donee of the power are the same.

38 Sufficiency and effect of language used

In particular cases, a will was held to have created a power of appointment where --

-- the donee was given the authority to determine the manner and sums that trust property was to be paid to the donee's issue.
-- a specified person was directed to "handle my estate as she sees fit."
-- the donee, a relative of the testatrix, was directed to distribute the remaining principal, together with all accumulated income, if any, or the entire residuary estate, "at such time, in such manner and in such amounts, if any, as he alone shall determine, to and among his then living children."
-- the will created a trust and directed that upon the death of a life beneficiary, the balance of the fund was to be paid in accordance with the terms of any valid will left by such beneficiary, and if he or she left no valid will then the fund would be paid to the persons entitled to his or her personal estate.
-- the will provided that any property that "becomes under the jurisdiction of my executors at any time must be divided among my children with preference given to my sons who marry girls of true Greek blood and descent and Orthodox religion."

On the other hand, it has been held that a testator's use of the words "insure for her comfort, security and her fair portion" with reference to his wife was insufficient to support the requisite intention to create a power of appointment, since the words did not express an intention to bestow upon another the power to dispose of identified property. Further, a holographic codicil providing that "my personal belonging" may be disposed of by a named

person in any way such person thought would do the most good, was held not to create a general power of appointment with respect to all personal property of the testatrix.

39 Precatory words

Definition: The word "precatory" is properly applied to an expression wherein a hope, wish, desire, recommendation, or request is indicated. Where the donor's required disposition of his or her estate is plain, direct, and conclusive, and does not constitute an entreaty, wish, desire, request, recommendation, or anything of that sort, it is clear that the power created by its donor is mandatory rather than precatory.

According to the Restatement Second, Property, words which merely express a suggestion or wish or desire that a transferee of property will make a certain disposition thereof do not, in the absence of other circumstances, cause the transfer to be less than it would be without the precatory words. However, though precatory words do not cause the transferee to receive any lesser interest than the transferee would otherwise receive, they may be a sufficient indication of intent to give the transferee a power of appointment over an interest not given to the transferee.

40 Necessity of specifying objects

To create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be benefited by its execution be specified in or be clearly ascertainable from the instrument by which the power is attempted to be created. Thus, a will fails to create a valid power of appointment where the language identifying the potential beneficiaries is not clearly ascertainable and the class of potential beneficiaries is not reasonably identifiable.

With respect to a special, exclusive power of appointment, it has been said that beyond the requirement that the testator must furnish a standard whereby appointees can be identified as falling within the designated class, there is no requirement as to size or specificity of the class of potential appointees. Thus, a class described as "the organizations in which she (executor) knows I am interested in contributing," provided a sufficient standard whereby appointees could be identified by the court. Further, a court has held valid a testamentary, special, exclusive power of appointment to a class consisting of "my close friends," as the term "friends" was in the context of that case sufficiently certain so that any future court could say that any particular person either was or was not a friend.

On the other hand, it has been held that an attempt to create a special power of appointment to distribute the principal of a trust "among such of my relatives as may then be surviving and among such charitable, educational or religious corporations, and in such proportions, as my friend and attorney, ..., shall, in his sole and exclusive discretion and judgment, fix, designate and determine" was invalid because it was too ambiguous to enforce. Likewise, a bequest to trustees of articles of personal property, with directions to distribute them among such friends as they may select, as mementos of the testator, sell the residue, and add the proceeds to the estate, could not be upheld as a power.

41 Power becoming appendant to owned interest as ineffective

According to the Restatement Second, Property, if a transfer purports to create a power to appoint a beneficial interest that is transferred to the purported donee, or that is owned or transferred by the purported donee, the power does not come into existence to the extent of the donee's beneficially owned interest. Further, if a donee acquires a beneficial interest in the appointive assets, the previously existing power is thereby extinguished to the extent of the donee's beneficially owned interest.

Comment: With regard to the rules concerning a donee's beneficially owned interest, the Restatement notes that --

-- no desirable end is served by allowing interests beneficially owned by the donee to be divested by an appoint-

ment.
-- the rules are applicable to powers to divest an interest owned by the donee in some form of co-ownership (but only to the extent that the power of appointment purports to apply to the donee's owned co-ownership interest).
-- that the rules are applicable to all types of intended powers, including general and non-general (or special) powers, powers presently exercisable and powers not presently exercisable.
-- that the rules do not apply where the named donee has ownership only in a fiduciary capacity.
-- that if a person named as the donee of a purported power appendant executes an instrument purporting to exercise such power, it is construed as a transfer of the interest described by the donee in the instrument.

42 Generally; intent of donor

The construction of a power is generally governed by the principles of the common law as such principles may have been changed by statute. Powers are construed in accordance with the intention of the donor of the power, as determined under the rules relating to the construction of instruments generally. Thus, an instrument, such as a deed or will, creating a power of appointment is to be interpreted so as to ascertain the intention of the donor and to give it effect unless some rule of law prevents it. Indeed, effect should, if possible, be given to every word or clause in the instrument that is not inconsistent with the general intent of the instrument as a whole. It is also a well known rule of construction that a will should be construed, if possible, so that no intestacy will occur.

A will conferring a power of appointment by will, and the will of the donee exercising such power, must be construed together.

43 Strict or liberal construction

A power must be strictly construed when its exercise will have the effect of cutting out remaindermen or executory devisees, or when it will alter the testamentary scheme of disposition.

44 Nature of power created

Depending upon the intent of the donor as determined by the language used in the creating instrument, a court may determine that the power created in a particular case was either a general, presently exercisable power, or a special or limited one.

Observation: When no restriction on possible appointees is indicated in an instrument creating a power, it is presumed that a general power is intended.

45 Scope of donee's authority

The general rule is that the scope of the donee's authority as to appointees and the time and manner of appointment is unlimited except to the extent the donor effectively manifests an intent to impose limits. In other words, the controlling factor in determining the scope of a power of appointment is the intent of the donor of the power, which is to be found in the four corners of the instrument creating the power. More simply, the nature and extent of a testamentary power of appointment depends primarily on the language of the will conferring it. Thus, the authority of the donee of a power is effectively circumscribed only by restrictions that are clearly expressed.

There is no policy precluding a person from vesting in another the uncontrolled authority to dispose of the property of the donor of the power. Rather, the law has long recognized that a general power of appointment may be conferred upon a donee permitting him or her to dispose of the property to whomsoever he or she pleases and for

reasons which are left entirely to his or her own choice. Indeed, it is settled that a general power of appointment may be so unlimited as to give its holder rights equivalent to absolute ownership. Thus, it has been held that absent a prohibition or restriction in a power, everything which is legal and within its limits should be judicially supported, but where there is a prohibition, limitation or restriction, such provisions will control and the donee will not be permitted to disregard it.

Observation: A distinction must be made between the intent of the donor in placing limitations on the power as to its scope and extent and the intent of the donor in setting forth a specific manner of exercise. In the case of limitations on the scope of the power, no intent of the donee, however manifest, can broaden the power beyond the intent of the donor. Thus, if the donor has limited the class to whom the donee can appoint, then the donee may not by the most rigid adherence to the manner of execution of the power change the scope of the power. When, however, the issue is the limitation as to the manner of the execution of the power, the intent of both the donor and the donee become relevant.

46 Effect of no contest or forfeiture clause, default-of-appointment provisions or creation of remainder interests

The exercise of a general power of appointment by a donee in his or her will is not rendered invalid because the donee's will contained a no-contest or forfeiture clause. nor does a gift to persons who are to take in event that a general power of appointment is not exercised by the donee of itself cut down or restrict the extent of the power.

Observation: In some early cases, powers which prima facie were general in nature were deemed limited to the persons indicated by the default-of-appointment provisions, but those cases rested on their peculiar facts and on the language and instruments in question.

The creation of a remainder interest does not curtail the right to exercise a power of disposition given to one holding a life interest.

47 Generally

A power to sell a fee ordinarily includes the power --

-- to sell a lesser estate or interest.
-- to grant an easement.
-- to grant the right to sell the timber on the land subject to the power.

A power to sell does not require that the property be disposed of for money only, since the word "sell" usually denotes the disposing of property for a valuable consideration. Thus, a conveyance in return for lifetime care constitutes a "sale" within the intendment of the power of sale although no monetary proceeds were realized.

Observation: A power of sale and the mode of its exercise, when the latter has the effect of cutting out remaindermen, must be strictly construed.

48 As including power to mortgage

It is generally held that a mere power of sale expressly conferred in an instrument does not, by implication, confer authority to mortgage absent anything in the instrument indicating a contrary intent. However, contrary authority holds that a power of sale impliedly confers authority on the donee of the power to mortgage the property. Moreover, the view has been taken that a power to sell includes a power to mortgage if, in the circumstances, mortgaging will as effectually carry out the intention of the donor and accomplish the purposes for which the power was created. There is also authority to the effect that the donee of a power of sale which is unlimited and is to be exercised for his or her own benefit may execute a mortgage under the power.

49 As inferable from power to sell and invest or reinvest

In some cases, a power to mortgage has been inferred from a power to sell and invest or reinvest, but in other cases such an inference has not been made.

50 As including power to exchange

Under some authority, in the absence of qualifying words or special circumstances from which an intent to confer a power of exchange can be inferred, a power of sale does not include a power of exchange. This rule has been applied even to a power of sale which gave discretion to the donee of the power.

Other authority holds that a power of "disposition" or a power to "sell and dispose of" includes a power of exchange. Thus, although a power of sale ordinarily is not construed as including a power to exchange, an exception may be recognized where the donee of the power has the right to reinvest the proceeds of the sale.

Similarly, while a power to sell and exchange has been deemed to include power to partition, a power of sale does not.

51 As including power to make gift

It is generally held that a power of sale does not ordinarily confer upon the donee the authority to make a gift or donation of the appointive property, or to convey it without consideration, even for public purposes. This is particularly true where the gift would defeat the interests of remaindermen, or constitute a fraud on them. Further, where a power of disposal is limited to a specific purpose, it does not include the power of disposal by gift.

On the other hand, a will giving the testator's surviving spouse a power to use, sell, mortgage, lease or otherwise dispose of the property as the surviving spouse sees fit creates and confers an unlimited power of disposition, including the power to give the property away.

52 Generally

The duration of a power ordinarily depends upon the donor's intention and purpose as derived from the terms of the instrument in which it is created, and will generally persist until the purposes of its creation are consummated. However, an express or implied release to the persons whose interest in the property would be affected by an appointment may extinguish a power. A general and beneficial power of appointment by will may be released and extinguished by the donee's deed, provided that there is no frustration of the donor's intention. A release or extinction of a power of appointment may be implied from a covenant of general warranty, or effected by some act of the donee which is inconsistent with the subsequent exercise of the power.

53 Election to take against will

Under some authority, a general or unlimited power of appointment over the corpus or remainder of which the surviving spouse-donee was given the life interest estate has been held to be extinguished by such spouse's election to take against the will. On the other hand, where the surviving spouse was given a limited or special power of appointment over the corpus or remainder of which such spouse was given the life interest or life estate, it has been

held that such power of appointment was not extinguished by the surviving spouse's election to take against the will.

54 Death of donee

A power of designation is such a special and personal right that it generally terminates on the donee's death, unless the creating instrument specifically provides for its exercise by his or her will.

55 Incompetency of donee

Since an adjudication of incompetency has an effect equivalent to the death of the holder or donee of a power, it has been held that a power of appointment terminates upon the adjudication of incompetency of the donee.

The validity of a testamentary exercise of a power of appointment by a donee sane when the will was executed but insane thereafter is discussed elsewhere in this article.

56 Death of donor

A mere naked authority or power expires with the life of the person who gave it. On the other hand, it is well settled that a power coupled with an interest is not extinguished by the death of the donor.

Where legal title is vested in trustees with a power of sale, there is a power coupled with an interest, and such power survives the death of the grantor. [n4] Moreover, a power of appointment by deed or will given to a trustee in a trust deed survives the death of the donor of the power. [n5]

57 Generally

A release may effectually extinguish a power of appointment. In order to extinguish a power there must be an express or implied release to the persons whose interest in the property would be affected by an appointment. Under the common law, all powers were releasable except powers in trust. Thus, the donee of a power of appointment may release it if it is one for his or her own benefit. On the other hand, the donee of a power of appointment which is simply collateral -- that is, a power concerning property to which the donee is an utter stranger -- may not release it unless it is one for his or her own benefit.

As a general rule, a power coupled with an interest may be released. A trustee's authority and discretion to accumulate rather than distribute income has been held to constitute a "power" within the scope of a state's Termination of Powers Act and such a power could be relinquished or released under that Act.

Observation: Once executed, a release is irrevocable.

58 General power

It is generally held or recognized that a general power of appointment may be released, whether presently exercisable or testamentary, especially where the donor contemplated that the donee might not exercise the power, and no serious or material frustration of the donor's wishes could result. Courts have observed that if the donee of a general power may appoint to his or her own estate or to anyone in the world, no individual is wronged by what he or she may do, and, therefore, no individual has a right to complain.

The Restatement Second, Property provides that a general power of appointment created by the donee can be released, in whole or in part, by the donee of the power, and that a general power not created by the donee can be released, in whole or in part, by the donee, except to the extent that the donor has effectively manifested an intent that it not be releasable.

The releasability of general powers of appointment has been upheld even where there was merely the possibility of acquiring such a power.

59 Nongeneral or special power

A nongeneral or special power of appointment can be released by the donee unless the donor in creating the power manifests an intent that it shall be nonreleasable. Thus, the Restatement Second, Property provides that a nongeneral power of appointment created by the donee can be released, in whole or in part, by the donee. Further, a nongeneral power of appointment not created by the donee can be released in whole or in part by the donee, except to the extent that the donor has effectively manifested an intent that it not be releasable.

Comment: A release of a nongeneral power of appointment that is presently exercisable in favor of objects that include the takers in default of an exercise accomplishes indirectly what could be accomplished directly, and hence no intention of the donor of the power is defeated by the release. If the takers in default of an exercise are objects of the power, even though the non-general power is not presently exercisable, as when the power is to appoint by the donee's will, and a release of the power does assure at an earlier date than may have been contemplated by the donor that the appointive assets will pass to the takers in default of appointment, no significant desires of the donor are defeated by allowing the release.

On the other hand, earlier authority holds that the donee of a non-general or special power of appointment may not release or extinguish it. Further, it seems quite certain that if a power of appointment is given to a trustee, as such, or is in the nature of a trust, then the donee may not release it.

60 Partial release

A power of appointment, whether general or non-general (special), may be partially released.

Comment: According to the Restatement Second, Property, a release that narrows the freedom of choice otherwise available to the donee but does not eliminate it is a partial release. A partial release may relate to the manner of exercising the power, or may relate to the persons in whose favor the power may be exercised, or may relate to a portion of the appointive assets.

A general power of appointment may be released in such a manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power or interest would otherwise be exercisable. Thus, a partial release may have the effect of converting a power into a non-general or special one which cannot be exercised through a general residuary clause. For example, a release of a power of appointment "except only in favor of the wife of the undersigned, the lineal descendents of the undersigned and the lineal descendents other than the undersigned" of the donor of the power created an exclusive special power of appointment. Further, the donee of a general power of appointment had only a special power after partially releasing the general power by voluntarily limiting the power with regard to selecting the possible appointees.

61 Jointly held powers

According to the Restatement Second, Property, if the exercise of a power of appointment requires the joint action of two or more persons, each donee has a general power of appointment if each of them (or their creditors, or their

estates, or creditors of their estates) is an object of the power. If only one (or only one's creditors, or only one's estate, or only creditors of one's estate) is an object of the power, that one has a general power and any other joint donee has a non-general power. The rules regarding release of general and non-general or special powers apply to the release by the joint donee who holds the general power and to the release of the non-general power by the other donee.

62 What constitutes release of releasable power

When a power of appointment is releasable, the court should be liberal as to the form of the release. No particular form of release is required. In the absence of any statutory provision specifically setting forth the manner in which the extinguishment of a power can be effected, the common law will govern. It has been pointed out that a release may not be limited to the manner provided by statute.

63 Specific methods

The donee of a general power may release his or her right to appoint by written instrument. Indeed, a statute may require that any release of a power of appointment must be in writing. At common law it would appear that delivery is required to effect a release since delivery represents strong concrete evidence that the releasing donee intends to part with his or her power to appoint. However, a recital in the donee's will that she did not intend to exercise the power to appoint was held not to constitute a "release," but merely a written statement by the donee of the power that she had not yet exercised the power to appoint.

Courts have also held that a releasable power of appointment may be extinguished by an agreement not to appoint or exercise the power. However, because an agreement by a donee not to exercise a power of appointment is equivalent to a release rather than a contract, the statutory remedy of restitution for unenforceable contracts to appoint is not applicable.

As for specific methods of releasing a power, the Restatement Second, Property provides that, in addition to any method authorized by the donor, the power can be released, in whole or in part, by the donee of the power:

.by delivering to a person who could be adversely affected by an exercise of the power a writing declaring the extent to which the power is released
.by joining with some or all of the takers in default of an exercise of the power in making an otherwise effective transfer of an interest in the property that is subject to the power, to the extent an exercise of the power thereafter would defeat any interest transferred
.by contracting with a person who could be adversely affected by an exercise of the power not to exercise the power, to the extent an exercise of the power thereafter would violate the terms of the contract
.by communicating in any other appropriate manner an intent to release the power, to the extent an exercise of the power thereafter would be contrary to manifested intent

A general power to appoint by will may be released and extinguished by the donee's deed.

64 Disclaimer by donee

A person who would otherwise be a donee of a power of appointment can, by a disclaimer, avoid acquiring the power or some part of it. The effect of the renunciation by the donee of a power of appointment is to terminate such donee's right to exercise any power over the subject property.

Comment: The Restatement Second, Property reasons that a person should not be forced to take a property interest and the responsibilities that come with it against his or her will. A power of appointment, even though it cannot be exercised for the benefit of the donee of the power, is like any other property interest in this regard, and it

cannot be forced on a person against such person's will. A disclaimer is to be contrasted with a release of a power of appointment by the donee of the power which occurs subsequent to the acceptance by the donee, so that a disclaimer cannot be made after the donee has accepted the power.

When the donee does not have the legal capacity, a disclaimer may be made for the donee by the person who is authorized to represent the donee, such as --

-- a guardian of an infant.
-- the conservator or the committee that represents a mentally incompetent person.
-- the executor or administrator of a decedent's estate.

65 Time for disclaimer

To be effective, a disclaimer of a power of appointment must be made within a reasonable time after the death of the donor, or after learning of the existence of the power. According to the Restatement Second, Property, the time between the attempted creation of the power in the donee and the donee's attempt to disclaim it is an important factor in determining whether the donee will be deemed to have accepted the power.

Statutes frequently specify the time within which a disclaimer must be made in order for it to be a valid disclaimer and not a release. For example, a statute may provide that a disclaimer of an interest created under a will is timely if filed within 9 months of the testator's death.

Observation: Once a donee has executed a testamentary power of appointment by will executed by the donee during the donee's lifetime, the executors appointed under the donee's will cannot subsequently disclaim or renounce the power of appointment after the donee's death, since the executors cannot be allowed to change the testamentary disposition and the will under which they are themselves acting.

66 Generally; by donor

It has been held that despite any declaration of irrevocability, a power is revocable unless it is coupled with an interest. Most courts hold that a power coupled with an interest cannot be revoked.

The Restatement Second, Property takes the position that the donor of a power of appointment cannot revoke or amend the power, or the interests created by the exercise of a power, except to the extent that a power of revocation or amendment is reserved by the donor at the time the power is created. [n3] The rationale given by the Restatement is that the donee is given an interest in the property subject to the power and like any other interest in property given by the donor to another person, the interest cannot be revoked or amended except to the extent that such power is reserved.

67 By donee

The Restatement Second, Property provides that a donee of a power of appointment cannot revoke or amend an exercise of the power, except to the extent that a power of revocation or amendment is impliedly or expressly reserved by the donee at the time the power is exercised and the reservation is not prohibited by the terms of the power. The rationale of the Restatement's position is that a donee of a power of appointment who exercises the power is like any other transferor of property in regard to revoking or amending the transfer, so that unless the donee in some appropriate manner impliedly or expressly manifests an intent that an appointment is revocable or amendable, the appointment will be irrevocable.

Since a will is ambulatory until the testator's death, the terms of the exercise of a power that are set forth in the will of the donee of the power may be revoked or amended by the donee to the same extent as any other provisions of the

will. If a power is exercisable by deed or will, the provisions in the will regarding the exercise of the power may be nullified by an inter vivos appointment by the donee that may cause what amounts to an ademption or satisfaction of the provisions exercising the power in the will.

Observation: An effective revocation of the exercise of a power of appointment restores the situation to what it was before the power was exercised, so that if the power would be exercisable had there never been an exercise followed by a revocation of it, the power will be exercisable to the same extent after the revocation.

68 Generally; power presently exercisable

The Restatement Second, Property declares that the donee of a power presently exercisable can contract to make an appointment in the future that is enforceable by the promisee, if neither the contract nor the promised appointment confers a benefit upon a person who is not an object of the power. The rationale for this rule is that a contract by the donee of a power of appointment presently exercisable to make an appointment in the future which the donee could make immediately does not open the door to the accomplishment of purposes indirectly that could not be accomplished directly, so that there is no reason for denying the donee of a power presently exercisable the right to contract to make an appointment as long as neither the contract nor the appointment confers a benefit upon a person who is not an object of the power. The Restatement goes on to say that if the donor of a general power of appointment presently exercisable undertakes to prohibit the donee of such a power from making a contract to appoint, such prohibition, if effective, would operate as a disabling restraint, and the validity of such prohibition should be determined by analogy to the rules applicable to disabling restraints.

Observation: There is, of course, a distinction between a contract to appoint in a particular manner and a contract not to appoint.

69 Power not presently exercisable

A contract by the donee of a merely testamentary power to appoint in a particular manner or to designated persons is invalid, or, as sometimes expressed, can have no legal operation.[n1] In other words, a donee of a power of appointment which is not presently exercisable, or of a postponed power which has not become exercisable, cannot contract to make an appointment, and such a contract is unenforceable. The policy which underlies the rule invalidating attempted contracts to appoint is the determination to safeguard the donor's manifested desire to keep the donee's exercise of the power unjelled until his or her death.

The Restatement Second, Property similarly declares that a donee of a power of appointment not presently exercisable cannot contract to make an appointment in the future that is enforceable by the promisee. The rationale for the Restatement's position is that the donor of a power not presently exercisable has manifested an intent that the selection of the appointees and the determination of the interests they are to receive is to be made in the light of the circumstances that may exist on the date the power becomes exercisable, so that a contract to appoint in a certain manner made prior to the date the power becomes exercisable, if valid, would defeat the donor's intent. A promise not to revoke an existing will that makes an appointment to the promisee is invalid to the same extent as a promise to make a will that will exercise a power in favor of the promisee.

Whether valid or invalid, a contract to exercise a merely testamentary power in a particular manner ordinarily does not operate to invalidate an appointment made in conformity with the contract.

70 Equitable relief

A donee of a power of appointment not presently exercisable cannot contract to make an appointment in the future that is enforceable by the promisee. Thus, courts will not specifically enforce a contract or promise to make an appointment under such a power, as to enforce such a contract would permit the donor's intent as to disposition of

his or her property to be directly defeated. Further, if an agreement to make and exercise a testamentary power of appointment is not performed, the property subject to the agreement cannot be charged with a trust in favor of the promisee. However, the promisee can obtain restitution of the value given by him or her for the promise unless the donee has exercised the power pursuant to the contract.

Observation: As a general rule, a contract to appoint a creditor, under a merely testamentary power, is no more subject to specific performance than a contract to appoint to some other person.

71 Damages

A donee of a power of appointment not presently exercisable cannot contract to make an appointment in the future. Thus, such a contract cannot be made the basis of an action for damages. The Restatement Second, Property follows a similar rule.

72 Restitution

The promisee of a contract to make an appointment can obtain restitution of the value given by him or her for the promise unless the donee has exercised the power pursuant to the contract. Further, a state statute may provide a remedy of restitution for unenforceable contracts to appoint. Similarly, the Restatement Second, Property provides that though the promise in a contract to make an appointment in the future cannot obtain damages or the specific property if the promise is not performed, the promisee may obtain restitution of the value that the promisee gave for the promise from the person who received the value.

Comment: The Restatement notes that the performance of the contract may relieve the donor of the restitution obligation, and that relief of the donee from the restitution obligation clearly is available when the donee is an object of the power, but if the donee is not an object of the power, there should be no relief from the restitution obligation if the promise is performed because otherwise performance of the contract would confer a benefit on a non-object.

73 Generally

The exercise of a power of appointment is a common way of controlling wealth, and the holder of such a power is treated in tax law as the owner.

A power of appointment can be exercised only in the manner specified by the donor. The formal requisites of an appointment are satisfied if the appointment complies with the formalities required by law for the transfer by the donee of owned property that is similar to the appointive property. The donee also must comply with any formalities the donor specifies. Because the donor of a power of appointment is the owner of the property subject to the power, the donor has the unlimited right to prescribe the time and manner of the exercise of the power of appointment, and the donee must exercise the power in the manner directed by the donor of the power. Another method will not suffice. Noncompliance with the donor's requirements defeats the appointment. Where the controlling requirements for exercising a power of appointment are clearly stated in the donor's will, the donee's intent is irrelevant if he or she fails to comply with those requirements.

Practice Guide: When a donor requests that a donee explicitly refer to the particular power of appointment in order to exercise it, the donee's failure to specifically refer to the particular power constitutes a failure to execute the power.

On the other hand, where there are several modes of executing a power, and the donor does not direct how the power shall be executed, the donee may select the mode, provided the power is executed in a manner that will legally convey the property. When the donor fails to specify the precise method for exercising the power, the scope of the

donee's authority as to the manner is unlimited, and whether the donee's acts constitute an exercise of the power becomes a question of intent.

Observation: A statute governing the formalities that must be observed in the execution of a power of appointment achieves the single function of dispensing with procedural formalities in the execution of the document, and it does not alter the rule that a donor may place limitations upon the scope and extent of the power and that such limitations are controlling.

A statutory provision for excusing compliance with the formal requirements of a power of appointment may excuse compliance with donor-imposed requirements that exceed the requirements imposed by law for the appointment instrument, but it cannot be used to excuse the failure to satisfy legal requirements.

The donee of a general power of appointment may, unless the donor has manifested a contrary intent, make appointments with conditions or charges attached thereto, provided they are lawful in themselves.

To support an execution of a power, there are several important requisites: the donee must have both the capacity and intent to exercise the power and must make a permissible appointment in terms of the persons and estate appointed.

74 Strict compliance; reasonable approximation

In order to be effective, the donee's exercise of the power of appointment must comply strictly, literally, or perfectly with any formal requirements imposed by the donative instrument. Thus, it would seem that an appointment lacking the required formality is simply not valid.

However, an equitable exception to such rule provides that failure of an appointment to satisfy the formal requisites of an appointment does not cause the appointment to be ineffective in a court applying equitable principles if: (1) the appointment approximates the manner of appointment prescribed by the donors; and (2) the appointee is a natural object of the donee's affection or a person with whom the donee has had a relationship akin to that with one who would be a natural object of the donee's bounty or a creditor of the donee, a charity, a person who has paid value for the appointment, or some other person favored by a court applying equitable principles.

The reason underlying this rule is that, where the donee has intended to exercise the power but has failed to observe to the letter some formality that the donor has prescribed, a conclusion that the power effectively has been exercised must be grounded on an interpretation of the expressed intent of the donor. In a particular case, it may be quite reasonable to conclude that, although the donor, in creating the power, prescribed a specific formality, his or her effective intent was merely to require sufficient formality to ensure against a hasty act by the donee. When a donor stipulates that a power of appointment is to be exercised by will, it may be assumed that he or she does so in order to extend, as far as possible, the period during which the appointment is discretionary in the donee, thus minimizing the danger of an ill-advised appointment.

Observation: Although a statute proscribes entering into a contract that would limit or direct how a power of appointment may be exercised, and such contract is unenforceable, any appointment made pursuant to such contract that otherwise complies with the scope of the power of appointment is not rendered invalid by virtue of the existence of the contract.
Comment: The rationale offered by the Restatement Second of Property is that the formal requisites of an appointment include both the requisites that are significant and those that are of minor importance and that, unless some significant purpose is accomplished by an additional formal requisite imposed by the donor, equitable relief from the rigid enforcement of such additional formality is available. However, the Restatement Second points out that formal requirements imposed by law with reference to instruments of appointment are always regarded as fulfilling a significant purpose so that their approximation is never sufficient in either law or equity to make the appointment effective. As for formal requirements imposed by the donor, the donor's purpose in imposing such additional requirements must be determined, and to the extent that failure to comply with such additional formal requirements will not undermine the accomplishment of a significant purpose, the court, in applying equitable principles, will

save the appointment when it is in favor of the objects of the power described above and the appointment approximates the formal requirements imposed by the donor.

75 Time of exercise

A donor of a power of appointment has the unlimited right to prescribe the time of the exercise of the power of appointment. However, except to the extent the donor effectively manifests an intent to impose limits, the scope of the donee's authority as to the time of appointment is unlimited, and execution of a power need not take place within any certain period of time. No limitation of time is imposed upon a power in the nature of a trust not limited in terms, unless the rule against perpetuities is involved or unless the power is controlled by an inherent quality in the nature of the trust or in the object for which the power was granted.

However, the general rule is that a power cannot be exercised before the time in which it was the intention of the grantor of the power that it should be exercised. Premature exercise of a power of appointment violates the purpose and intent of the donor.

A power of appointment, whether general or nongeneral, is presently exercisable if the donee at the time in question by an exercise of the power can create an interest, present or future, in an object of the power. A power of appointment, whether general or nongeneral, is not presently exercisable if it is exercisable only by the donee's will or, at the time in question, is not exercisable until the occurrence of some event or the passage of a specified period of time. A power of appointment must come into existence before the issue of whether it is presently exercisable or not presently exercisable can be determined; a power of appointment set forth in a document that is presently legally operative, as is the case of the powers of appointment described in a revocable trust, is in existence during the donor's lifetime, even though it may not become exercisable until the occurrence of some event that may never occur.

76 Applicable law in point of time

The cases are not in agreement as to the applicable law in point of time that should govern matters relating to whether the donee properly exercised a power of appointment. Some cases hold that the law in effect at the death of the donor, rather than that of the donee, governs the validity and sufficiency of the donee's exercise of a power of appointment, although other cases hold that a will takes effect as of the time of the testator's death so that the exercise, by a provision thereof, of a power of appointment is made at that time rather than at the time of the execution of the will. By the same reasoning, it has further been held that the appointee's interest, like the interest of any beneficiary under a will, vests at the death of the donee, unless an intent to the contrary is manifested. However, there is some authority to the effect that the law that was in force when the donee's will was executed is the law that determines the intention of the testator with regard to exercise of a power of appointment. Moreover, at least one court has held that the sufficiency of an execution of a power of appointment by the testator is governed by the law in force at the time of admission of the will to probate.

77 Power dependent on condition or contingency

A donor may impose conditions and requirements upon the exercise of a power of appointment, as well as upon the manner in which such power may be exercised, and the valid exercise of that power is dependent upon compliance with those conditions and requirements. Whether general or specific, a power of appointment is not presently exercisable if it is not exercisable until the occurrence of some event. One who claims title under the execution of a naked power must prove the performance of all conditions precedent to the exercise of the power. Furthermore, where a special power is given, to be exercised only on the happening of a certain event and made a condition precedent, it can be executed only at the time and on the conditions prescribed in the instrument creating it, and the purchaser must, at his peril, ascertain whether the contingency on which the sale is authorized exists. However, the

latter rule applies only where the condition on which the power is to be exercised is on the happening of a certain event or independent fact, such as majority or marriage of someone named, which may be ascertained by anyone with equal certainty. It does not apply and is not the law where the condition is such that the determination of whether it has been fulfilled requires the exercise of judgment and discretion as to which there may be an honest difference of opinion, and, in cases of this character, the decision of the donee of the power is conclusive of the question, and a disposition of property made in pursuance of the power, in good faith or without notice to innocent purchasers, will not be set aside, although it may afterward appear that the judgment of the donee was erroneous.

A surviving spouse may be given a life estate with the right to dispose of any part of the property as might be necessary for his or her maintenance, in which case the authority or right to dispose of the property becomes contingent on such condition, that is, that it is necessary for maintenance, but when that contingency arises and the power is exercised, then the remainder in the property is thereby defeated and the grantee receives the fee in the property. A decision by the donee of a power to sell a decedent's realty on the question of the existence of necessity, upon which the power to sell is conditioned, is conclusive in the absence of fraud.

78 Consent of third person

Where the person whose consent to the execution of a power is required by the instrument creating it dies, the right to execute the power ceases.

Under a will granting a testator's wife a power of appointment as to the corpus of a trust of which he was the income beneficiary and requiring that her execution of the power be filed with the corporate trustee at the time of her death, it was held that the donee's exercise of the power of appointment did not require any act of any of the trustees, and they were not required to approve or consent to the exercise because the power was without any restrictions and it was reasonable to assume that the testator wanted his wife to be free from any outside influences.

Observation: The donee of a power of appointment may execute a power of attorney document requiring that the donee exercise the power only upon authorization by a majority of his or her children.

79 Power to sell or convey

A power to sell or convey can be exercised only in the manner and subject to the express conditions specified in the instrument conferring the power, and it must be exercised in accordance with the donor's intent. The donor may place limits on the scope of the donee's authority to exercise a power of appointment, and the donee does not own the property subject to the power. Powers to sell realty are to be executed in the mode, if any, prescribed in the instrument that creates them, and, if none is prescribed, the mode in general use for conveying land is the one to be observed. Thus, where the instrument conferring a power to sell does not prescribe the terms on which sale is to be made, the donee is authorized to sell on such terms as will carry out the intention of the donor. Where, however, a power of sale is given a fiduciary, this dispenses with the provisions of law as to procuring an order of sale and regulating the manner of sale.

One who undertakes to execute a power of sale is bound to the observance of good faith and a suitable regard for the interests of his principal. The rule precluding fiduciaries from purchasing at their own sales applies to a sale by a person, such as an executor, under a power of sale. Where a power is given to sell at auction, it cannot be executed in any other manner, but the objection may be removed by an agreement of the parties beneficially interested in the property under the deed of trust that created the power.

Where a will gives a power of sale not coupled with an interest, the fee may vest in the devisee or heir until the sale, but as soon as the power is executed, they, as well as all to whom they may have conveyed, are divested of the fee, which immediately vests in the purchaser under the power. It is said that this will be injurious to purchasers, but it cannot be so where due caution is used, for they may always inspect the will and ascertain whether any such power exists or not. Moreover, if a power to convey is general and a conveyance is a fraud upon the power, no estoppel

arises in favor of the grantee unless he paid value without notice. On the other hand, if, by deed or will, a person is invested with power to sell land for the purpose of reinvesting the proceeds, no obligation devolves on the purchaser to see that the reinvestment is in fact made, although he is liable if he knew of an intended diversion of the proceeds.

80 Exercise as question of law or fact; judicial function

Whether a power of appointment was exercised under the circumstances of a particular case is essentially a question of law rather than of fact.

Observation: The question of the exercise or nonexercise of a power of appointment created by an instrument intended to take effect during the lifetime of the donor is uniformly passed upon by a court of general jurisdiction in the exercise of its equities powers, with an exception where the question of the exercise of the power is only incidental to a determination of inheritance tax. In cases where the power is created by the last will and testament of the donor, the question is passed upon by the probate court having jurisdiction over the testamentary trust created by the last will of the donor of the power, with the same exception where the inquiry is incidental to a determination of the taxability in the estate of the donee of the exercise or nonexercise of the power.

Equity will not compel or control the discretion or exercise of a mere naked power of disposal among the members of a class that is purely discretionary with the donee.

A finding by the court that a power of appointment was effectively exercised was not beyond the scope of a petition by the executors for instructions where a substantial stock market decline had affected the bulk of the estate and where the instructions were sought for the purpose of obtaining the immediate delivery of the appointed assets and an authorization for immediate distribution of the legacies provided by the will in order to spread the risk of further stock market decline among all beneficiaries, to provide flexibility in selling securities to meet current and future cash obligations during a period of instability in a stock market, and to preserve a portion of the estate for residuary beneficiaries; the exercise of the power of appointment provided in the donor's will was an essential ingredient of the testator's testamentary plans, and the program recommended by the executors in their petition for instructions could not be accomplished without immediate distribution of the appointed assets to them, and distribution of such assets, in turn, required the threshold decision as to whether the power of appointment had been validly exercised by the donee.

81 Generally

The donee of a power has the capacity to make an effective appointment if the donee has the capacity to make an effective transfer of similar owned property. If the donee of a nonfiduciary general power to appoint by deed does not have the capacity to make an effective appointment, the legal representative of the donee may make an effective exercise of the donee's power for the benefit of the donee where the legal representative could make an effective transfer of similar owned property for the benefit of the donee, unless the donor has manifested a contrary intent. In the event of the incapacity of the holder of a fiduciary power, a successor fiduciary succeeds to the power, unless the donor manifests a contrary intent. If the donee of a power is incapacitated, the right that would otherwise exist in the donee to disclaim the power passes to the donee's legal representative.

82 Mental incompetency of donee

A donee of a power may be mentally incompetent at the time a power is created or become mentally incompetent later. This fact does not prevent the power from coming into existence or staying in existence. During the incompetency of the donee, it is assumed the donor intends that the legal representative of the donee of a nonfiduciary general power to appoint by deed is to be permitted to exercise the power for the benefit of the donee to the same extent the legal representative could make an effective transfer of similar owned property for the benefit of the

donee, unless the donor has manifested a contrary intent. The mental incompetency of the donee does not affect the effectiveness of an existing instrument of the donee that purports to exercise the power. The incompetency of the donee of a fiduciary power shifts the power to the successor fiduciary unless the donor manifests a contrary intent.

The time for testing the donee's capacity to exercise a power of appointment is determined at the time of execution of that power, and, if the donee was admittedly of sound mind on the date of execution of the will in which the power was exercised, the donee's subsequent incompetency will have no effect on the validity of the exercise.

The fact that a conservator has been appointed for the person and estate of the donee does not necessarily mean that the donee was incompetent to exercise the power of appointment, particularly where there is substantial evidence of competency and no substantial evidence to the contrary.

Language in a testamentary trust giving an individual beneficiary the right to withdraw sums of money from the principal of the trust constitutes the creation of a power that can be exercised by a guardian if the person whose direction the trustee is authorized to follow becomes incompetent and a guardian is appointed. On the other hand, a general power of appointment established in a beneficiary under a trust instrument cannot be exercised by a guardian appointed after the beneficiary becomes incompetent where such exercise is not to provide care, maintenance, and support, but to effect a testamentary disposition of property.

83 Minors

The fact that the donee of a power is a minor does not prevent the power from coming into existence. A purported exercise of a power by a minor is subject to ratification or disaffirmance by the minor when the minor becomes of age, the same as a purported transfer by a minor of owned property. The legal representative of a minor donee may make an effective exercise of a nonfiduciary general power to appoint by deed for the minor's benefit to the same extent the legal representative could make an effective transfer of similar owned property of the minor for the minor's benefit, unless the donor of the power has manifested a contrary intent.

There is early authority to the effect that if it clearly appears to have been the intention of the donor of the power that it might be exercised, notwithstanding the infancy of the donee, a power may be exercised while the donee is an infant but that, where an infant is invested with the title by a plain deed, the power to sell, if conferred, implies only the right to sell when the grantee becomes of age. It has also been held that a power to appoint by last will and testament, conferred upon a minor, is inchoate and cannot be exercised until the donee reaches majority. On the other hand, there is some authority indicating that even if the will of a minor is invalid as such because of the testator's age, the provisions thereof with reference to the exercise of the power of appointment may be valid and provable.

84 Court authorization for legal representative to exercise power

The rules in regard to the exercise of an incompetent donee's power by a legal representative of the donee relate to what the legal representative can do without advance court approval. A court may have jurisdiction to give the legal representative additional authorization to exercise the incompetent donee's power.

85 Generally

Ordinarily, the person designated as the donee by the creator-donor of a power will be the one who will exercise it at the proper time and in the proper manner. Unlike the office of an executor or a trustee, a power of appointment conferred upon a person by name is ordinarily personal and can be exercised only by the donee. However, there may be situations in which the question arises whether a power can be exercised by someone other than the donee thereof, as where the donee lacks the legal capacity to execute the power, where there are joint donees, or where the

authority is delegated or transmitted by the donee to another.

86 Capacity in which power is exercised

A deed executed by a trustee to convey property held in trust will operate as an exercise of the trustee's power of disposition notwithstanding the failure on its face to indicate that it was executed by the trustee in his or her capacity as such when the intent to exercise the power can be inferred from the circumstances surrounding the transaction.

87 Joint donees

Generally, where powers are conferred on two or more persons and it is dependent on their judgment whether or not it shall be exercised, the power is a special confidence in their combined judgments, and the concurrence of both or all is necessary to a valid exercise of that power. The general rule is that all executors who qualify must join in the execution of a sale before the estate may be bound by the sale, and, under the Uniform Probate Code, all personal representatives must act jointly in conveying real estate.

88 Survivor

Where a naked power is conferred on two or more individuals jointly, it cannot be executed by the survivor, even though the title of an office is added merely for description purposes, unless the instrument creating the power provides that it may be executed by the donees or the survivor. On the other hand, where the power given to two or more donees jointly is one coupled with an interest, it may be executed by the survivor. It is the possession of a right in the subject over which the power is to be exercised that makes the interest, or creates an authority coupled with an interest, which survives for the purpose of effecting the object of the power.

Observation: A key factor is the intent of the donor-creator of the power; a general power of appointment vested by a will in joint donees survives when one of them predeceases the testator, at least where it can be determined that such was the intent of the testator. Conversely, a testamentary power of sale conferred on two named executors will not survive the death of one of them, and sales of real property made by the surviving executor may be set aside where the intention of the testator, as indicated by repeated references in the will to actions to be taken by the coexecutors in their joint discretion, was that the power of the remaining executor not survive.

89 Delegation or transmission

It has sometimes been stated that where the exercise of a power of appointment or alienation involves confidence and discretion, the exercise of the power cannot be delegated, as by creating a new or further power of appointment, unless there is something in the gift of the power to justify the delegation. Thus, there can be no assignment of a power that is created by words clearly indicating that the donor intended that the power be exercised only by the selected donee. This rule has been applied to powers, such as powers of sale.

Where, however, no discretion is involved, the power may be delegated, and, even if a discretion is involved, the donee may delegate such acts as do not involve discretion. A limited power of appointment is not an asset of the appointee that can be assigned or transferred.

90 Generally

The donor of a power of appointment has the unlimited right to prescribe the manner or mode of exercising the power, and the donee must exercise the power in the manner directed by the donor. A power to appoint by will cannot be exercised by a deed, a mortgage, or a letter. All the formalities prescribed by the donor of the power must be strictly complied with.

Where the donor provides for the execution of the power by a conveyance by a trustee on the written request of the beneficiary, a conveyance executed by the beneficiary does not execute the power.

The assumption in cases where the donor has conditioned the exercise of a power of appointment on an express reference to the original creating instrument is that the donor intends the trust property to pass under the trust itself, unless the donee affirmatively exercises the power.

Observation: The donee of a power should act in a rather formal manner; he or she should act by some instrument sufficient to pass the estate or property. However, technical language is not necessary to the exercise of a power of appointment, and no particular form of instrument is required, unless the donor specifies that the power must be exercised only by deed or by will.

91 Instrument under seal

Where an appointment under the hand and seal of the donee is specified, an unsealed instrument is inoperative. However, where a marriage settlement gave a power of appointment by writing under hand and seal attested by three creditable witnesses, a deed that the witnesses attested as having been sealed and delivered was a sufficient execution of the power, although they did not attest the fact of signing.

It has been recognized that a power of appointment to be exercised by a written instrument signed, sealed, and acknowledged may be executed by the holographic will of the person in whom the power was given.

92 Generally; where instrument not specified

Where a general power to dispose of property is given without specifying the manner of execution, the power may be executed either inter vivos or by will. Where the language in the instrument creating the power is broad enough to indicate that the donor intended that the donee should have the absolute power of disposal, including a disposition by will, the donee may execute the power by will.

Comment: The Restatement Second of Property notes that, when the donor prescribes that the power may be exercised "by deed or by will," it is to be inferred that the donor means by these words to require the instrument or act of appointment either be formally sufficient under the applicable law to be legally operative in the donee's lifetime to transfer an interest to the appointee if the donee owned the appointive assets or to be formally sufficient to be admitted under the applicable law.

93 Requirements as to execution by will

Where the instrument creating a power specifies that it is to be executed by will, the power can be exercised only in the manner specified, by an instrument that is formally sufficient to be admitted to probate under the applicable law.

It has been held that a power to dispose of property at the death or decease of the donee thereof may be exercised by deed as well as by will. There is, however, some authority to the contrary.

Where the will creating the power of appointment provides that the donee must exercise the power by will, the donee has no power to make a present gift of the subject matter of the power.

Where a trust settlor provides that the remaining principal of a trust fund should be paid over to such person as the beneficiary may, by his or her last will and testament, appoint or, in default of such appointment, to his or her distributees, the power to appoint by will could be exercised, if at all, only by a testamentary instrument in accordance with the direction of the settlor, and if the donee dies intestate, the remainder will be vested in the distributees as the alternate beneficiaries under the will.

Where a power is to be executed by will to be operative as an execution of the power, the will must comply with all the formal requisites as to wills.

Where the instrument creating the power provides that the power must be exercised by specific bequest or devise, such provision is given effect. The exercise of a general power of appointment by will is not invalidated because the will contains a no-contest clause. A testamentary power of appointment cannot be exercised by a revoked will.

A power of appointment by will may be exercised up to the last moment of the life of the donee.

94 Intent to exercise power by will

The intent to exercise a power of appointment by will, to be effective, must be so clear that no other reasonable intent can be imputed under the will. Technical language in a will is not necessary to the exercise of a right or power of appointment by will, and, if the intention is clear, it will be given effect, however informal the language may be.

A purported will that is not admitted to probate within the statute of limitations on the presentment of wills can be used to determine the testator's intent as to his or her powers of appointment over trusts, even though the purported will has no force as a will.

95 Requirement as to execution by instrument other than will

Where a statute provides that unless expressly prohibited by the creating instrument, a power stated to be exercisable by an inter vivos instrument is also exercisable by a written will, but the trust instrument specifically provides that the power of appointment created therein is to be exercised by "Trustor's written instrument other than a Will," the words "other than" are synonymous with "except," so that a will executed by the trustor is not a proper exercise of the power of appointment.

FOOTNOTES:

n1 Rosenauer v. Title Ins. & Trust Co., 30 Cal. App. 3d 300, 106 Cal. Rptr. 321, 81 A.L.R.3d 953 (2d Dist. 1973).

REFERENCE: West's Key Number Digest, Powers [westkey]32, 34(1), (2)
A.L.R. Digest: Power of Appointment and Alienation
West's A.L.R. Digest, Powers [westkey]32, 34(1), (2)
Restatement Second, Property (Donative Transfers) §§ 18.2, 18.4
West's Key Number Digest, Powers [westkey]34(1)
West's A.L.R. Digest, Powers [westkey]34(1)

American Jurisprudence, Second Edition

Laura Dietz, J.D., and Jeffrey J. Shampo, J.D.

96 Requirement as to execution by deed

Where the instrument creating a power specifies that it is to be executed by deed, the power can be exercised only in that manner by an instrument executed with the usual formalities requisite for such an instrument.

97 Construction of will exercising power; proof

The rules for interpreting wills have been applied in determining whether a will exercises a power of appointment. Where the wording and style of the donee's will attempting to exercise a power of appointment are not those of one skilled in the drafting of wills, in order to determine such donee's intention, the court will interpret the will from a layman's point of view and with greater liberality than a will drafted by a lawyer. In determining whether a power of appointment has been validly exercised, the instrument creating the power and the instrument exercising the power must be read together.

Observation: Joint construction is particularly appropriate where the two wills were executed on the same day before the same witnesses, one of whom was an attorney; appoint the same executor; and contain very substantially identical language except for the dispositive provisions.

The intent to appoint and its execution are to be sought through the entire will of the donee and not from any single word or phrase. However, the donee's intent to exercise the power of appointment must be evident from the document itself. Direct evidence of the testator's intention is inadmissible. The burden of establishing the execution of a power of appointment by will rests on the one claiming such execution.

98 Parol or extrinsic evidence

The admission and consideration of extrinsic circumstances and facts is governed by the general rules applicable to the admissibility of evidence in the construction of wills. A statute regulating powers of appointment may restrict the use of extrinsic evidence in the construction of a will, which purports to exercise a power, to circumstances surrounding the drafting and execution of the instrument and prohibit the introduction of such evidence unless it explains or clarifies some wording of the instrument.

99 Probate of will exercising power

Where there is a power to appoint land by a will, sufficient proof that the will purporting to exercise the power was properly executed as a will must be made by a production of the will with due proof thereof, or original probate or reprobate, in accordance with the law where the land is.

Observation: Under the law of some states, the process of probating a will is title-accommodating rather than interest-creating so that a testamentary power of appointment is created immediately upon the testator's death, but is

subject to later perfection by probate; in other words, a power of appointment, like a legacy or devise, is inchoate pending probate and then dates back to the date of death upon probate.

A purported will exercises a testator's power of appointment over a trust, even though the purported will is never admitted to probate, where a trust document allows the testator to exercise the power of appointment using a deed, conveyance, bill of sale, or gift or by any written instrument executed by the testator.

100 Foreign decree as entitled to full faith and credit

Where the will of the donor of a power of appointment was made in the state where the donor resided, but the will of the donee was made in another state in which the donee resided, the probate of the donee's will in such state establishes that the will was executed according to the law of that state but does not establish that the will was executed according to the law of the state in which the donor resided, nor does it undertake to adjudge that it was a good execution of the power. Accordingly, the judgment of a court of a state, where a power of appointment was created and where the lands subject to the power are located, that a will executed and probated in a foreign state where the donee resided was not executed in accordance with the law of the forum does not deny full faith and credit to the foreign judgment of probate. A decree of a probate court of the domicil of the donee of a power to appoint by will, adjudging that the donee died intestate because of the revocation of his will by a subsequent marriage, does not, by virtue of the full faith and credit clause of the Federal Constitution, preclude the probate court of another state, in which the donor of the power was domiciled, from determining whether the instrument executed by the donee was under local law a valid exercise of a power of appointment over property within its jurisdiction, because an adjudication that a testamentary instrument executed by a nonresident is a valid exercise of a power of appointment by will over property within the jurisdiction of the court does not involve the question whether that instrument is a will under the law of the donee's domicil and its effect as to property owned by him.

On the other hand, the determination of the intent of a donee in exercising a testamentary special power of appointment by a court of competent jurisdiction in the state within which the donee is domiciled at the time of the power's exercise is binding in any subsequent judicial proceedings and entitled to full faith and credit with respect thereto. Where a court has jurisdiction of the trust res and the parties, its judgment determining the essential validity and extent of the exercise of powers of appointment is, even if erroneous, conclusive and binding on the parties and entitled to full faith and credit in the courts of another state, and such judgment is not open to collateral attack. The order of a court, which construed the will of a domiciliary who exercised a general power of appointment created by a trust indenture in another state, is entitled to full faith and credit in a proceeding in the latter jurisdiction to settle the final account of the trustee.

The judgment of an out-of-state court rendered with regard to the validity and functions of a guardianship established by such court is entitled to full faith and credit, but the exercise of a personal power of appointment, which has been granted to the beneficiary of a trust that subsequently becomes incompetent, by the guardian, after authorization by such court, is not binding upon the court administering the trust where the trustee and the takers in default under the trust have not been parties to the guardianship proceeding authorizing the exercise of the power.

101 Generally

There is a conflict of authority on the issue whether an attempted appointment by will before creation of the power is valid. Some courts hold that, because, at the time of executing a will, a testator cannot ordinarily have in mind the execution of powers subsequently created, a will does not, in the absence of statute affecting the problem, operate to execute a subsequent power, unless the language of the will or the circumstances of the case are exceptional.

Observation: This position is also taken by the Restatement Second of Property, which says that a power of appointment is not effectively exercised by an otherwise legally effective instrument of appointment that undertakes to exercise the power before the power is created.

There is authority, however, in which, irrespective of statute, powers have been executed by anterior wills, particularly where, because of nearness in point of time and other circumstances, the will is reasonably to be treated as a part of the transaction giving rise to the power. Some cases hold that a power existing at a donee's death, but created after execution of his or her will, is effectively exercised thereby, if the will is an otherwise effective appointment, unless the intent of either donor or donee is manifested to the contrary or in the absence of a specific requirement to the contrary in the instrument creating the power. Language in the instrument creating the power, stating that such power of appointment "shall be exercisable by will," merely declares the sole manner of exercise of the power and does not mean that the power should be exercised only by a will made after the power is created.

102 Application of rule to general and special powers

Under the prevailing rule, in the absence of statute or exceptional circumstances, general powers are not executed or exercised by prior wills. Where, in making a conveyance, a grantor reserves to him- or herself a general power to appoint the property by will, the courts frequently, and more often than in other nonstatutory cases, arrive at the conclusion that the power is exercised by the prior will of the grantor. In all such cases, however, the question is one of intent under the language of the will and the surrounding circumstances.

There seems to be no reason why a special power cannot be executed by a will of prior date if the proper intent can be gathered from the will.

103 Effect of statutes

State statutes have sometimes provided that a general devise or general bequest shall be construed to include any real or personal property that the testator may have power to appoint in any manner he or she may think proper and shall operate as an execution of such power, unless a contrary intention appears by the will, and that every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. Where both such provisions exist, general powers are executed by anterior wills unless a contrary intention appears by the will.

104 Simultaneous death of donor and donee

The appointment by the donee and the creation of the power by the donor may occur as the result of the deaths of the donor and donee simultaneously or under circumstances where the order of their deaths may not be able to be established by proof. In such an event, the Restatement Second of Property proffers the rule that, in the absence of a contrary manifestation of intent by the donor, the donee should be presumed to have survived the donor in applying the rule regarding attempted appointment before the creation of the power in order to increase the situations in which an effective exercise of the power can occur.

105 Intent of donor or donee

In ascertaining whether a power of appointment has been validly exercised, the court is to be guided, at least initially, by the intent of the donor of the power, and, in determining such intention, the court will regard as particularly significant the language used by the donor viewed in light of the rule of law in effect in those circumstances at the time the power in question was created. However, the view that the intent of the donor is controlling in construing an instrument purporting to exercise a power does not mean that the intent of the donee is irrelevant; indeed, the intent of the donee to exercise is as important as the intent of the donor. Questions involving the

interpretation of the exercise of a power of appointment are always ascertained by reference to the donee's intent, which is derived from a sympathetic reading of the donee's instrument as an entirety and not from any single word or phrase. The donee of a power may execute it without expressly referring to it or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. If it is uncertain whether an act was intended to be an execution of the power, it will not be construed as an execution.

For an exercise of a testamentary power of appointment to be valid and effective, two requirements must be satisfied: (1) the intention of the testator to exercise the power must be shown; and (2) there must be compliance with any conditions established by the donor for its exercise. In order for a donee to exercise a power effectively, it must be established: (1) that the donee intended to exercise it; and (2) that the expression of the intention complies with the requirements of exercise imposed by the donor and by rules of law. Something must appear to show an intent to execute the power, and such intent must be clear.

106 General rule in absence of express reference to power

In the absence of a statute providing otherwise, the general rule is that if the donee of a power executes an instrument or provision not expressly referring to his or her power, such an instrument or provision, by itself, does not exercise the donee's power. This rule has been considered especially applicable where the donee has an interest of his or her own in the property subject to the power or where the instrument executed by the donee is a quitclaim deed. However, the rule is a mere rule of construction rather than an irrefutable rule of law, and it has often been held overcome by evidence of surrounding circumstances. Moreover, in some jurisdictions, there are statutes creating presumptions or rules in favor of the exercise of a power.

107 Necessity of reference to power

A power may be validly exercised by a reference thereto, and such a reference is one way in which the donee's intent may be manifested, but it is by no means the only way. Thus, the prevailing doctrine is that the question whether the instrument is an execution of the power depends upon the intent of the donee and that it is not necessary that the power should be referred to therein if the intent to execute is otherwise manifested, in the absence of any such requirement in the instrument creating the power. If, from the tenor and effect of the instrument by which title is conveyed, the intent to execute the power is inferable, there is a valid execution of the power. If the donee of a power intends to execute it and the mode is in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by implication, will make the execution valid and operative. The execution of the power, however, must show that it was intended to be such execution, for, if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution.

108 Nontestamentary transaction, pecuniary bequest, or specific devise or bequest

In the absence of a statute providing otherwise, it is the general rule that if the donee of a power to dispose of property makes a nontestamentary transaction without expressly referring to such power, such a disposition, by itself, does not sufficiently manifest the donee's intention to exercise the power. However, a number of courts have taken the view that the surrounding circumstances may be considered in determining the donee's intent.

With respect to provisions of a testamentary nature, such as pecuniary bequests or specific bequests or devises, a substantial number of cases have held that the exercise of a power of appointment was intended, although other decisions have held that such provisions were not intended to exercise a power of appointment.

With regard to nontestamentary transactions, such as sales, gifts, or leases, it has sometimes been held that a deed or other instrument was intended to exercise a power to convey, sell, or lease a certain property interest, although a number of cases have held that such instruments were not intended to exercise such powers.

109 Proof or presumption of intent

According to the prevailing rule, the intention to exercise a power must be proved and will not be presumed; if it is doubtful whether the donee intended to exercise his or her power, the power is not exercised. The burden of proof rests upon the party claiming the exercise of a power of appointment, although it is not necessary for the person claiming that there was a proper exercise of the power to present so forceful and compelling a case that it is impossible to form a rational supposition contrary to such contention; the object of the court's investigation is to determine the probable intent of the donee by a preponderance of the evidence and to carry it out in accordance with the donee's wishes, even though they may be imperfectly expressed, and the court will do what elemental justice and fundamental fairness demand under the circumstances.

The rule that the intention to execute a power will not be presumed, but must be affirmatively shown, is not, however, followed in at least one jurisdiction where there is a presumption in favor of an intention to execute a power, particularly when the question of the effect of a general or residuary devise or bequest as an execution of a power is involved. Furthermore, it appears that in some other states, the law presumes that a testate decedent has exercised his or her power of appointment unless a different testamentary intent appears expressly or by necessary implication.

110 Statutory presumption or rule

A presumption or rule in favor of the exercise of a power may be created by statutes, such as those providing that every instrument executed by the grantee of a power, conveying an estate or creating a charge that such grantee would have no right to convey or create, unless by virtue of his or her power, shall be deemed a valid exercise thereof, even though such power is not recited or referred to therein, and those declaring, in effect, that a general devise of real estate or a bequest of personal property described in a general manner shall operate as an execution of a general power to appoint in any manner, unless a contrary intention appears in the will.

111 Testamentary exercise of after-acquired power

A manifestation of intent in the donee's will to exercise powers includes powers acquired after the execution of the donee's will, unless the exercise of the after-acquired powers is specifically excluded.

112 General rule

The three classic circumstances under which a power is held to have been intended to be exercised are:

(1) where there is an express reference to the power in the instrument of execution;
(2) where there is an express reference to the property that is the subject of the power; and
(3) where the provision in question would be inoperative unless construed as an exercise of the power.

113 Relaxation of rule

Some courts have relaxed the rule regarding how intent to exercise a power of appointment may be proved and have been willing to find such intent from all of the facts and circumstances. Thus, in such a jurisdiction, if, from the tenor and effect of the will, construed in the light of the circumstances surrounding the testator at the time of the

execution of the power, it can be fairly determined from all the competent evidence available that it was the intention of the testator to execute the power, such intention will be given effect. Ultimately, of course, each case must be determined upon its own facts and circumstances, but the fundamental purpose of the inquiry to determine the donee's intention always remains, and the primary goal of the court is to effectuate the wishes of the deceased if they are reasonably and lawfully discoverable and adequately proven.

However, in determining whether a power of appointment has been executed by will, the admission and consideration of extrinsic circumstances and facts is governed by the general rules applicable to the admissibility of evidence in the construction of wills. Thus, the use of extrinsic evidence is limited to interpreting the words and phrases in the instrument purporting to exercise the power and to circumstances surrounding the drafting and execution of the instrument.

114 Nontestamentary transactions

It has been recognized in a number of cases involving deeds and other nontestamentary instruments that the surrounding circumstances may properly be considered in determining the donee's intent. Thus, the donee's use of a warranty deed is a circumstance in favor of concluding that an exercise of a power of disposition was intended, whereas use of a quitclaim deed is considered a strong indication of the donee's intention only to convey his own interest in the property, without exercising any powers that he may have over the property.

115 Donee's declarations or statements

The declarations or statements of the donee of a power as to his or her intention to exercise it are inadmissible and not entitled to consideration. Accordingly, evidence of direct declarations by the donee of a power of appointment as to whether he or she intended in his or her deed or will to exercise such power has been held inadmissible. Thus, evidence of the donee's own declarations other than those contained in his or her will has been held inadmissible and not entitled to consideration where such evidence is offered for the purpose of varying, contradicting, or adding to the terms of the will.

116 Effect of donee's knowledge of existence of power

The fact that a donee of a power was aware of the existence of a power of appointment at the time of the execution of the donee's will is a circumstance that supports the conclusion that ambiguous language in the donee's will reflects an intention to exercise the power. Conversely, an intent not to execute a power may be shown by the fact that the donee was not even aware that his or her power existed, although it has been held that because a donee's power authorized him or her to convey the property interest that he or she purported to convey, he or she would be held to have intended to exercise his or her power, even though he or she was not aware of the nature or even of the existence of the power.

117 Direction in will for payment of debts or funeral expenses

In the absence of an express reference to a power of appointment, a testamentary provision for the payment of debts or funeral expenses will not be construed as an exercise of the power, although there is authority to the contrary. The usual provision for payment of the testator's debts, contained in a will that did not in any way refer to the power of appointment or to the trust estate, cannot be deemed to operate as an execution of the power of appointment in favor of creditors to the extent of their claims.

118 Other circumstances indicating donee's intent

If the donee's deed or will, read with reference to the property the donee owned and other circumstances existing at the time of the execution of the donee's deed or will, indicates that the donee understood that he was disposing of property covered by a power, the donee thereby manifests an intent to exercise the power.

Circumstances that have been held by the courts to support the conclusion that a donee intended to exercise his or her power are:

(1) that the donee's instrument, although it might pass some interest by reason of the donee's ownership in the property conveyed, would not have full effect unless construed as an exercise of the donee's power;
(2)that the construction of a donee's instrument as an exercise of his or her power is necessary in order to prevent him or her from being held liable on warranties contained in the instrument;
(3)that the amount of consideration received by the donee in return for his or her conveyance substantially exceeded the value of his or her own interest in the property conveyed and was equal to the value of the larger interest over which his or her power existed;
(4)that a donee who could exercise his or her power only in a particular fiduciary capacity expressly referred in his or her instrument to the fact that he or she occupied such a fiduciary capacity;
(5)that the donee's instrument contained an express reference to the instrument that had created his or her power; and
(6)that the beneficiaries or grantees named in the instrument executed by the donee of a limited power were the same persons as those who were permissible objects of the limited power.

Although any one of the circumstances discussed above may be deemed very significant in a particular case, it has generally been recognized that the surrounding circumstances should be considered in their entirety and that no one circumstance can be necessarily controlling in all cases.

Observation: Some cases have stated that the donee's intent to exercise the power of appointment must be evident from the document itself.

119 Intent not to exercise power

Among the circumstances that have been held to support the conclusion that an exercise of a power was not intended are:

(1)that the donee's instrument could have effect as a conveyance or transfer of the donee's own interest in certain property;
(2)that all of the provisions of the donee's instrument could be effective without being construed as an exercise of his or her power;
(3)that the donee's instrument was a quitclaim deed;
(4)that the amount of consideration received by the donee in return for his or her conveyance was closer to the value of his or her own interest in the property than to the value of the larger interest over which his or her power existed;
(5)that the donee's instrument contained no reference to the instrument that had created his power; and
(6)that the donee was not even aware that his or her power existed.

120 Generally

A blanket appointment is one by which a testator undertakes to make a blanket exercise of any and all powers of appointment that the testator may have from any source. Such blanket exercises of powers of appointment have become common practice, and the efficacy of such clauses in exercising powers is well-recognized. A blanket appointment stating that "all property and interest in property in respect to which I may have at the time of my death the power from any sources to appoint the disposal of by my will" has been held to show a clear intent by the donee to exercise a power of appointment.

The Restatement Second of Property says that if the donee by deed or will manifests an intention to exercise all powers the donee has, the manifested intention includes the exercise of both general and nongeneral (special) powers that are exercisable by the deed or will.

Because of the widespread use of the blanket "all powers" clauses, many objectionable consequences have resulted. Undertaking to cope with this problem, many estate planners began to recommend that a will setting up a power of appointment also contain a requirement that the power can be exercised only by making specific reference to the donor's will.

121 General rule

In the absence of a statute providing otherwise, the general rule is that, if the donee of a power of appointment, without expressly referring to his or her power, executes a general residuary clause or a general devise or bequest of all his or her property, such a testamentary disposition does not, by itself, sufficiently manifest an intention to exercise the donee's power,

Thus, where there is no reference in the will to the power or to the property that is the subject matter thereof and where the will is fully operative without the aid of the power, a general devise or bequest will not operate as an execution of the power. It has been held that a general residuary clause that provided for the distribution of property "which I may own or have the power to dispose of at the time of my death," but which made no express mention of the testatrix' power of appointment, was not a sufficient exercise of that power. A general residuary clause in which the testator refers to the property devised or bequeathed as his or her property will not be considered to be an exercise of the power of appointment. Furthermore, a will making no specific reference to the power of appointment but bequeathing the decedent's net estate to the plaintiff in trust, and containing an item giving "all of the rest, residue and remainder of my property of every type, kind and description including lapsed legacies, of which I die possessed or entitled," failed to exercise the power of appointment.

122 View upholding intent to exercise

Contrary to the rule that has been followed in other jurisdictions, Massachusetts cases have taken the position that despite the absence of applicable statutory provisions and of any express reference to a power of appointment, a general residuary clause of a donee's will or a general devise and bequest of all of his or her property is presumed to have been intended to exercise his or her power, unless there is a clear indication of contrary intent. Moreover, this rule of a presumption in favor of the donee's intention to exercise a power has been followed in some other jurisdictions.

A number of other cases have held that where the intention of the donee to effect an exercise of a power of appointment has otherwise been sufficiently proved by the surrounding circumstances, a general bequest or devise or a residuary clause will in the absence of statute be held a sufficient exercise of the power. An express declaration of intent by the donee will be given effect.

The rule favoring an intent to exercise a power has been interpreted to only create a rebuttable presumption that can be overcome by the language of the instrument or evidence and circumstances outside the instrument itself. Also, where there are no facts or circumstances indicating that the testator intended to exercise a power of appointment by means of a general residuary clause of his or her will, then it must be held that he or she failed to exercise the power of appointment.

123 Special or limited powers

It appears that special or limited powers cannot be exercised through a general devise or bequest or a residuary clause in a decedent's will either under the Massachusetts rule or the general view upholding a general devise or bequest or residuary clause as a sufficient indication of intent to exercise a power of appointment, in the absence of a statute to the contrary.

124 Generally

Various types of surrounding circumstances are generally held entitled to consideration in determining whether the donee of a power has sufficiently manifested the intention to exercise a power of appointment by disposition of all or the residue of the donee's property without referring to the power. Not only has the presence of one or more of these circumstances been considered a factor in favor of holding that the donee intended to exercise his or her power, but also the absence of one or more of these circumstances has often been considered a factor in favor of holding that the donee did not intend to exercise his or her power. Moreover, the surrounding circumstances have not only affected the results of decisions as to whether any exercise of a power of appointment was intended, but also have affected the results of decisions as to whether a power of appointment, where exercised, was exercised solely by the residuary clause of the donee's will or by other clauses as well.

125 Failure or insignificance of provision unless construed as exercise of power

It is generally held that the amount of the donee's estate at the time of execution of his or her will, or at the time of his death, if it is personalty, may be considered in determining whether a general or residuary devise or bequest was intended by him or her as an execution of a power of appointment. If the donee has no property of his own and a provision of his will purporting to dispose of his property would have no meaning or effect unless construed as an exercise of his power of appointment, such a circumstance has been considered a strong indication that the donee intended to exercise his power. Likewise, if the donee has some property of his own that is capable of passing by a provision of his will purporting to dispose of his property but the amount of his own property is very insignificant in comparison with the size of the appointive property, or insufficient to satisfy the bequests made, such a circumstance is regarded as indicative that the donee intended to exercise his power. Moreover, if the donee refers in his will to the property that is the subject of his power of appointment and the donee's will is not capable of passing any interest in such property, unless construed as an exercise of his power, such a circumstance has been held to indicate that he intended to exercise his power.

On the other hand, it has been held that a factor in favor of concluding that the donee of the power did not intend to exercise it is the circumstance that the donee's own property, without any appointive assets being used, would provide a substantial inheritance for the beneficiaries named in his will.

126 Tax consequences

In determining whether a donee intended a residuary clause to constitute an exercise of a power of appointment, the reasonableness of the tax effects upon the estate, depending upon the treatment of a donee's power, bears consideration. Thus, the court may look to the logic and reasonableness of the tax effect and the resulting dissipation of the estate in determining the donee's intent.

127 Donee's knowledge of existence of power

The fact that the donee was aware of the existence of his or her power at the time he or she executed his or her will has been held to support the conclusion that the donee intended to exercise the power. Conversely, the fact that both the testator, who was an attorney, and the attorney acting for him were familiar with the provisions of the trust,

including the terms providing for a power of appointment by will and for disposition in default of exercise of the power, and yet they included nothing in the testator's will suggestive of an intention to exercise the power, indicated that testator had no such intention.

Observation: One case has held that a will provision giving the residue of the testator's estate, including property over which the testator has a power of appointment, to named beneficiaries constituted a valid exercise of a power of appointment, regardless of whether the decedent was or was not aware that he or she possessed such a power.

128 Generally

The donor of a power of appointment may restrict the exercise of that power by requiring a specific mention of the power by the donee, and when such a requirement is imposed, it must be complied with by the donee. Noncompliance defeats the appointment. A donor's requirement that the donee make specific reference to the power of appointment is not unlawful and does not offend public policy. Such a requirement ordinarily negates any presumption that a general residuary clause may exercise the power and mandates, for effective exercise of the power, an affirmative act by the donee at least approximating the indicated formality.

Each case involving a requirement of a specific reference must be determined on its own facts respecting the sometimes elusive intent of the testator.

129 Purpose of requirement

As some courts have noted, a "specific reference" provision is inserted in the instrument creating the power in order to prevent an inadvertent exercise of the power and to require sufficient formality to ensure against a hasty act by the donee.

130 Sufficiency of reference by donee

In determining whether there has been sufficient compliance with a specific reference requirement, the critical inquiry is not whether the donee intended to appoint but rather whether the donee manifested such intent in the manner prescribed by the donor, that is, by making specific reference in his or her will to the power granted by the donor's will. Such a requirement has been construed as not meaning that the donor intended to create a rigid and unyielding limitation upon the exercise of the power so that, if the donee's attempted exercise approximates the manner of appointment prescribed by the donor, it may be upheld by the court. The court must avoid any interpretation that would attribute to the donor an intention that only a repetition of his or her verbatim language will satisfy the power because such an interpretation would frustrate the objectives of the donor in creating the power of appointment. What the donor intends in such cases is a reasonable substantive compliance with his or her expressed intention that the donee identify the grant of power by a deliberate act.

Accordingly, in some cases where the creating instrument required the donee to make specific reference, the courts have held that certain language in the donee's will, short of such a specific reference, was sufficient to exercise the power. Obvious oversights or typographical errors will be disregarded.

On the other hand, many cases have held that a general devise or bequest, or a residuary clause broadly disposing of any property over which the donee may have a power of appointment, does not constitute sufficient compliance with a donor's requirement of specific reference to the power.

131 Generally

Statutes may declare, in effect, that a general devise of real estate or a bequest of personal property described in a general manner shall operate as an execution of a general power to appoint in any manner, unless a contrary intention shall appear in the will, and such statutes have been applied so as to uphold a general devise or bequest as an execution of power of appointment in a number of cases. Such statutes are, of course, applicable to general residuary devises or bequests, and under them a residuary clause in a donee's will operates as an execution of a power of appointment, unless a contrary intention appears in the will.

132 Applicability to limited or conditional power

Where a statutory provision creating a presumption in favor of the exercise of a power of appointment expressly refers only to a power to appoint in any manner the donee may think proper, the statutory presumption applies only to a general power of appointment and not to a limited or special power of appointment, but where the statutory provision contains no express indication as to what type of power of appointment is covered by the presumption, the statutory presumption applies to limited or special, as well as to general, powers of appointment.

133 Effect of requirement of specific reference to power

A statute providing that no appointment made by will in the exercise of a power shall be valid unless executed in the manner required by law for the execution of wills and that every will executed in such manner shall, so far as respects the execution and attestation thereof, be a valid execution of a power by will, notwithstanding that it may be expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity, does not nullify a provision in a power of appointment requiring specific reference in the donee's will because such a provision does not concern the execution and attestation of a will.

In some jurisdictions, the applicable statute provides that, where an instrument creating a power of appointment directs that the power be exercised by an instrument that makes a specific reference to the power, the power can be exercised only by an instrument containing the required reference, and that a general power of appointment vested in a donee is exercised by a residuary clause or general language in the donee's will unless, inter alia, the creating instrument requires that the donee make a specific reference to the power or to the instrument that created the power. The apparent object of these statutes is to prevent the inadvertent exercise of a power of appointment contrary to a donee's actual intent.

134 Surrounding circumstances supporting or opposing presumption

Among the matters considered by the courts as supporting or -- to the extent permissible -- as opposing a statutory presumption in favor of the exercise of a power, the ones that appear to have received the most attention are the entire contents of the donee's will and such surrounding circumstances as the extent of the donee's own property, the extent of his or her past or present interest in the appointive property, his or her knowledge, and the state of his or her affections. Other circumstances held to support a statutory presumption that the donee intended to exercise his or her power are that the donee's past interest in the appointive property had been so extensive that he or she was likely to have considered the appointive property as part of his or her own property or estate and that the beneficiaries named in the will of a donee of a limited power of appointment were the same persons as those who were permissible objects of the donee's limited power.

Among the factors that have been considered as opposing a statutory presumption in favor of the exercise of a power are: (1) that the construction of a particular testamentary provision as an exercise of a power of appointment would result in the failure of such a provision or some other provision; (2) that, although the donee did not expressly refer to the power of appointment in question or to the property subject to the power, he or she used such an express reference in exercising a different power; and (3) that the beneficiaries named in the will of a donee of a limited

power of appointment were outside the permissible object of the donee's limited power. It has been emphasized, however, that these factors and others that might tend to indicate a lack of intent to exercise a power of appointment are not necessarily controlling and are often insufficient to overcome a statutory presumption in favor of the exercise of power.

135 Failure or insignificance of provision if not construed as exercise of power

If a provision of the donee's will purporting to dispose of his property would have no effect unless construed as an exercise of his or her power of appointment, such a circumstance is a factor strongly supporting a statutory presumption that the donee intended to exercise his or her power. Likewise, if a provision of the donee's will purporting to dispose of his or her property is capable of having some effect, but the amount of the donee's own property is very insignificant in comparison with the size of the appointive property, such a circumstance has been considered to support the statutory presumption in favor of the exercise of power of appointment.

136 Failure of different provision expressly referring to power

A factor that has been considered as opposing a statutory presumption in favor of the exercise of a power is that, although the donee did not expressly refer to his or her power of appointment in the provision in question, a different provision of his or her will, though held invalid, expressly purported to exercise the power. Other cases have held, however, that the fact that certain provisions of a donee's will purported expressly to exercise his or her power of appointment, but were invalid, is insufficient to overcome the statutory presumptions that other provisions, which did not refer to the power, are to be construed as having exercised it.

137 Generally

Although the courts have in a number of cases emphasized that a donee's reference to the property that is the subject of his or her power indicates that he or she intended to exercise his or her power, it appears that the rule as to reference to the subject of a power is merely a subsidiary to the rule that an exercise of a power will be held to have been intended where a provision would fail unless construed as an exercise of the power. Thus, the fact that an instrument refers to the subject of a power does not seem, in itself, to be sufficient ground for holding that an intention to exercise the power is manifested, but this is a sufficient ground only if an instrument or provision referring to the subject of the power would not be effective unless construed as an exercise of the power. Thus, it is the failure of a provision, unless construed as an exercise of a power, rather than the mere fact that a reference has been made to the subject of the power, which is the basis for holding that a reference to the subject of a power warrants the conclusion that the donee of the power intended to exercise it. Where the power is repudiated or there is no intention to execute it, the mere mention of the specific property in an instrument of transfer will not impute an execution of the power.

The Restatement Second of Property provides that if a donee, sufficiently identifying property covered by a power, purports to dispose of the property by deed or will, the donee thereby manifests an intent to exercise the power.

Comment: The Restatement's rationale is that when the donee purports to dispose of property covered by a power, even though the donee does not refer to the power, it is a fair inference that the donee's dominant purpose is to cause the designated beneficiary to receive the property. The method by which the result is obtained is secondary. Therefore, the words used are construed as an expression of intent to appoint.

138 Naked power

A naked (or collateral) power is one not coupled with an interest. Where a person has a power over property, but no interest therein, a deed or mortgage by him or her of the specific property exercises the power, both because of the reference to the property and because the instrument would be inoperative if not so considered. Accordingly, on the basis of principles that are subsidiary to the general principle that the exercise of a power will be held to have been intended where the donee's instrument or provision purporting to pass the property would otherwise fail, it has often been held that, if the donee purported to pass an interest in certain property and there was no interest that he could pass except by exercising his or her power, he or she must have intended to exercise the power and that, therefore, the donee's reference to the property that was the subject of his or her power indicated that he or she intended to exercise it.

139 Power coupled with interest

The general rule is that, where a person who has a power over property and also an interest therein executes an instrument purporting to affect the property without referring to the power, the instrument affects merely his or her interest, provided no contrary intent appears. Thus, it is generally held that, in the absence of an express reference to a power and in the absence of statutory provisions to the contrary, there is a rule of construction that if the donee of a power to dispose of the entire interest in certain property has an interest of his or her own in the property and purports to convey the property, then his or her conveyance is intended only to convey his or her own interest and not to exercise his or her power.

Such a rule, however, may be overcome by evidence of other circumstances indicating that the donee intended to exercise his or her power rather than merely to pass his or her own interest in the property. For example, it has been ruled that if an instrument executed by the donee and purporting to pass an interest in the property subject to his or her power cannot have full effect unless construed as an exercise of the power, even though some interest would pass by reason of his ownership, then the instrument will be construed as having been intended to exercise the power. Various other factors and circumstances have been considered in determining that the donee intended to, and did in fact, exercise his or her power, although the donee had an interest in the property. Thus, it has frequently been held that, if the donee of a power to convey or encumber the fee in certain real property also owns a life interest or similar interest in the property, a deed or mortgage executed by him or her purporting to convey the fee will be construed as having been intended to exercise his or her power. Therefore, also, where a person is possessed of a life estate with power to appoint a fee, a devise of the property is a good execution of the power.

On the other hand, where the testator has other property so that the provisions in the will would be effectual without the exercise of the power and there was no reference in the will either to the power or to the subject matter of the power, it is generally held that it has not been shown that there was an intention to execute the power.

140 Effect of warranty or quitclaim deed

It has been emphasized in a number of cases that a warranty deed is generally intended to convey all that is possible to carry out the covenants of warranty and that, where a donee of a power grants a warranty deed, he or she is not likely to intend to charge him- or herself with liability on his or her warranty; therefore, it has been held that if a donee who grants a warranty deed has no interest of his or her own in the property conveyed, or if it is necessary to construe his or her deed as an exercise of his or her power rather than as a conveyance of only his or her own interest, in order to avoid liability on his or her warranty, then the deed should be construed as an exercise of the power or at least as indicating that an exercise of the power was intended. Accordingly, a general warranty deed executed for a consideration equal to the value of the fee and professing to convey the fee is a valid execution of the power.

Quitclaim deeds are subject to the general rule of construction that, if the donee of a power to dispose of the entire interest in certain property has an interest of his own in the property and purports to convey the property, his or her conveyance is intended only to convey his or her own interest and not to exercise his or her power.

141 By will

Although the donee of a power of appointment fails to mention or refer to the power in the will by which it is claimed he or she has executed the power, if he or she, in his or her will, has referred to the specific property, interest, or estate that was the subject of the power in such manner as clearly to show his or her intention to exercise it, then he or she will be deemed to have done so. The donee of a power of appointment is often granted a life estate of his or her own in the appointive property, as well as his or her power of appointment. Under such circumstances, when the donee dies, the only interest in that property that can pass by his or her will is what remains of the appointive interest. If such a donee refers in his or her will to property that is the subject of his or her power of appointment, provisions purporting to devise or bequeath such property will be inoperative unless construed as an exercise of the donee's power of appointment because the donee's own interest in the property, as distinguished from his or her power to appoint the property, is terminable upon his or her death and thus cannot be devised or bequeathed. Therefore, as a subsidiary to the general rule that a power will be deemed exercised where provisions of the will would otherwise be inoperative or meaningless, there has developed the rule that the donee will be held to have intended to exercise his or her power of appointment where his or her will contains a reference to the subject of the power and where his or her appointive interest in the property is the only interest that he or she is capable of devising or bequeathing.

142 Under general power

The Restatement Second of Property provides that a donee of a general power under which an appointment can be made outright to the donee or the donee's estate is permitted to make any appointment directly that could be made indirectly by appointing to the donee or the donee's estate and then disposing of the appointive assets as owned property.

Comment: The Restatement's rationale is that, where the donor creates a general power under which an appointment can be made outright to the donee or the donee's estate, it is a necessary inference that the donor intends that the donee can accomplish by first making the appointive assets owned property of the donee or the donee's estate and then disposing of such owned property. The donee may accomplish by an appointment to others more than could be accomplished by a disposition of the appointive assets after making them owned property.

143 Creation of new power

A donee of a general power under which an appointment can be made outright to the donee or the donee's estate is permitted to create any power in another directly that could be created indirectly in another by appointing to the donee or the donee's estate and then creating the power in connection with a disposition of owned property.

Judicial authority supports that position, holding that the donee of a general power of appointment may exercise the power by giving a third person a power of appointment. In other words, the donee of a general power can effectively exercise the power by creating a new power or by appointing a partial estate and creating another power. Thus, also, a donee acting under a general power may appoint a life interest and create in the appointee a general power to appoint the remainder.

However, it has been held that a testamentary general power of appointment cannot be exercised by giving a third person a power of appointment, on the grounds that the donee did not have power to appoint to him- or herself and that there was nothing in the power indicating otherwise than that it should, of itself, be a final and complete disposition and there was nothing to indicate that the donee might delegate his responsibility or privilege. It seems that, in most cases, the donee may not create in a stranger a power to appoint an interest in the property.

The invalidity of an attempt by the donee of a power of appointment to delegate the power or to create a new power does not affect an alternative disposition by the donee, in default of the exercise of such delegated or new power.

144 Under nongeneral or special power

Unless the donor has manifested a contrary intent, a donee of a nongeneral power is permitted to make any appointment that benefits only objects of the power that the donee could make of owned property in favor of those objects.

Comment: Language of the donor that creates the power by use of customary language referring to the manner of exercise only in general terms is not to be taken as a manifestation of intent to curtail what would otherwise be the freedom the donee would have in making appointments. The fact that there is only one object in whose favor the power can be exercised may justify the conclusion that only an outright appointment can be made.

145 Creation of new power

Unless the donor has manifested a contrary intent, a donee of a nongeneral (special) power may exercise that power by: (1) creating a general power in an object of the nongeneral power; or (2) creating a nongeneral power in any person to appoint to an object of the original nongeneral power.

Donees acting under limited powers have been regarded as authorized to appoint property to an object for life and to create in the appointee a general power to appoint by will -- and where that may be done it seems the appointee can be given power to appoint by either deed or will. A special power of appointment can be exercised by giving a life estate to an object with special power of appointment among the objects named by the original donor. Moreover, where a donee of a special power of appointment gives a life estate to an object with a special power to appoint among objects named by the original donor, it is permissible for the donee to provide that, in the case that a life tenant does not exercise his power of appointment, the remainder shall go to objects named by the original donor.

146 Appointment of donee or estate

General powers of appointment have been defined as those that authorize the donee to appoint anyone, including him- or herself, his or her estate, and his or her creditors. According to some courts, however, it is not essential in order to render a power general, that the donee have the right to exercise the power at any time or in any mode that he or she sees fit so that he or she could appoint to his or her own use in the donee's lifetime. Under this rule, a power is general or not according to the persons or uses to which the property may be appointed under it, and not according to the time when its exercise takes effect in possession or the instrument by which its exercise is to be manifested, so that a power to appoint by will is general where its objects are unlimited. However, other courts limit general powers to such as the donee could bring into the market for his or her own purposes so that they do not include powers that the donee could exercise only at death. Under the law of some states, the terms in a will providing a donee with a general power of testamentary of disposition with respect to certain property do not accord the donee the power to appoint the property to him- or herself or to his or her estate.

The scope of a donee's disposition as to appointees is unlimited, except as the donor effectively manifests an intention to impose limits. A power that is general in terms will not be cut down to a particular power unless there is an apparent intent.

Observation: The intention of the donee to appoint to his or her own estate must be expressly stated or clearly implied.

147 Necessity of standards for identification of object

Beyond the requirement that the testator must furnish a standard whereby appointees can be identified as falling within the designated class, there is no requirement as to size or specificity of the class of potential appointees. Thus, appointment to a class consisting of "my close friends" has been upheld as sufficiently certain so that a court could say that any particular person either was or was not a friend. Likewise, a class consisting of "the organizations in which [donee] knows I am interested in contributing" provides a sufficient standard whereby appointees may be identified by the court and, in the event of a challenge to any appointment made pursuant to the power, proof of testator's interest as evidence by records of past contributions or other provable evidence of interest demonstrated during testator's lifetime could be considered by the court.

148 Under power to appoint children

In some cases, the courts have been called upon to construe powers of appointment to children. It seems generally agreed that a power to appoint children does not include grandchildren as objects of the power.

A special power to appoint to children and issue of deceased children gives the donee the power to benefit living children or issue of any children predeceasing the donee, but the donee acts in excess of the special power by appointing a portion of the appointive assets to a surviving child for life and then for the benefit of such child's issue.

149 As including adopted children

Where the donee's will appointed the balance of the donor's residuary estate to be divided among the children then living of named grandchildren, it was held that an adopted child of one of the grandchildren acquired no interest in the appointed property where the adoptee was born before the donee's death, but the order of adoption was entered nearly a year after the donee's death.

A statute may prevent an adopted child from inheriting under a will through the adoptive family where such adoption operates to defeat the rights of remaindermen under the will, in which case a power of appointment in favor of such adopted child will not be recognized. Where a trust beneficiary's general testamentary power of appointment was subject to defeat only by her having a child and being survived by the child or its issue, but such biological possibility had been eliminated by her reaching an age beyond childbearing, her power became an interest or right that was vested so that a statute, which provided that words such as "child" or "issue" in a grant or devise include adopted children is inapplicable to any interest or right that vested prior to a specified year, was not rendered ineffective, and the beneficiary's exercise of her power should be given effect so as to include adopted children who survived the beneficiary.

150 Under power to appoint issue, descendants, heirs, and the like

A power to appoint issue is not limited to children but includes descendants at any distance. Where a power is limited in favor of children or their descendants, it has been held that the issue of living children cannot be appointed. However, there are some cases indicating that adopted children cannot be appointed under a power of appointment in favor of issue.

A power to appoint to testator's heirs cannot be exercised in favor of children whose parents are living. A surviving spouse is not an heir and takes no interest in any real estate as an heir.

The word "kindred," as used in a power conferred by a testator upon a daughter to appoint to and among her children or any other kindred who may survive her, does not limit the possible beneficiaries of the power to her next

of kin where the testator in his will used the words "next of kin" and where it is apparent that it was his intention that the property was to pass as in the case of intestacy.

151 Under power to appoint nephews and nieces

Under a will devising real property for life, with the power in the devisee to give the property by will to such of the testator's nephews and nieces and in such proportions as the devisee might choose, the devisee cannot devise the property to the issue of such nephews and nieces in the event of the death of the latter.

152 Under power to appoint persons

Under a will directing that, upon the death of the life beneficiary, the principal of the trust fund was to pass to such persons as the donee of the power might designate or appoint by will, it has been held that the term "persons" includes charitable corporations, the courts rejecting the contention that such word limited appointment to natural persons.

153 Generally

The question as to what estates may be created under a power of appointment must depend upon the terms of the power and the intention expressed by those terms, for every mode of dealing with an estate may be effected through the means of a power that could be exercised by the original author of the power. On the other hand, the principle has been stated that, where the exercise of a power is merely restricted to certain persons, the reasonable inference is that the nature of the interest to be appointed is left to the discretion of the donee.

A person having the power of appointment as to lands may exercise it by subjecting the lands to the payment of sums of money to various members of the class to whom appointment may be made. A general power of appointment for the use of the donee may be executed by a mortgage.

Practice Guide: The draftsman of an instrument granting a power of appointment should spell out with considerable care the donor's intentions with respect to: (1) the interests creatable in the appointees (that is, may the donee of the power appoint the property in trust or on condition or must all appointments be outright?); and (2) the limits of the power. If the power is special, other questions arise, such as whether the donee may appoint limited interests, such as life estates, to some or all of the members of the class and whether he may appoint interests in trust.

154 Appointment of fee

It has been said that a general power of appointment enables the donee to appoint a fee. The donee of a power may convey a fee if authorized by the terms of his or her power, although, by the instrument creating it, he or she has him- or herself only an estate for life. In some cases, however, the courts have limited the power of disposal of the life tenant to a disposition of the life estate, largely because of the words in which the power was couched in the particular case.

155 Limited or lesser estates or interests

Courts have held that under a power to appoint property in fee or personalty absolutely, the donee was authorized to appoint lesser estates or interests where the power was unrestricted as to the quantum of estate appointable or where

no contrary intent was indicated on the part of the donor. Furthermore, although the courts in Massachusetts have reached different results in determining whether a power of appointment limited as to objects included the power to appoint less than absolute interests, apparently on the basis of different rules of construction as well as the particular language used in the power, the state's Supreme Judicial Court has declared that the rule of construction that should be applied in the future to powers, limited as to objects, is that the donee can effectively appoint less than absolute interests if, but only if, the donor does not manifest a contrary intent. Given that the intent of the donor is universally recognized as governing the extent of the donee's power of appointment, the courts have thus focused upon the particular language used by the donor in creating the power in question to determine the donor's intention. Under a power specifically authorizing an appointment in fee or absolutely, the courts have reached different results, some courts having concluded that the donee was empowered under such language to appoint lesser interests, although others have concluded that the donee had no power to appoint lesser interests under such language or in view of the provisions of the will containing the power.

Under a power authorizing an appointment by the donee in such manner, for such estates, for such interests, or upon such conditions, as the donee may direct, it has been held that the donee was authorized to appoint less than absolute interests, such language generally being construed to be unrestricted as to the type of estate appointable, where the donor's intent was manifested both by his practice in creating life interests and by the language of the power itself and where the donor's intent was manifested by the language of a default of appointment provision. However, it has been held that, under a power authorizing an appointment in such manner or for such estates as the donee may direct, the donee could not validly appoint less than absolute interests where such would be in violation of the donor's intent generally or where there was only one designated beneficiary in existence at the donee's death.

A power to appoint property in such shares, proportions, or parts as the donee may direct has been held to authorize an appointment of limited interest where such language was generally construed to be unrestricted in nature or where the donor's intent to allow such an appointment was manifested by the general scheme of the donor's will containing the power and other extrinsic acts.

In construing a power to appoint to such persons, corporations, or designated beneficiaries as the donee may direct, the courts have generally concluded that the power was unrestricted as to the type of estate or interest appointable and thus authorized an appointment of less than absolute interests.

156 Trust interests

Whether one having power to appoint realty in fee or personalty absolutely may place it in trust is a question that depends for its answer upon the reasonable construction of the language creating the power. In most cases, the language of many instruments being very broad, the power to create trusts has been upheld. Where the power is a general one to appoint in fee, and especially where it is literally power to dispose of the property, the donee is ordinarily authorized to create a trust because, where a power is expressly unlimited as to appointees, it is usually unreasonable to suppose that the donor intended that only absolute interests might be given.

Moreover, where the power is not only a general one to appoint to such persons as the donee may see fit but also contains words of special signification, the conclusion that power is given to appoint to trustees may be unavoidable. In many cases, sometimes found cited as giving support to a rule that power to appoint property authorizes placing it in trust, the language of the power in question was so broad and significant as to leave little room for doubt as to the right to appoint upon trusts the expressions "for such estates," "for such interests," "in such manner," "subject to such limitations," "upon such conditions," or equivalent or added expressions being used.

The question whether in a particular case a limited power to appoint property in "such shares" or "proportions" or "parts" (but not expressly to appoint in such "manner," for such "estates," upon such "limitations," etc.) authorizes an appointment to trustees is distinctly one of the reasonable construction of the instrument creating the power, and in some cases, in reference to particular language under construction, limited powers to appoint shares or proportions have been held not to authorize appointments to trustees, especially where the direction has been to pay to or to divide among the designated objects.

Where the provisions of a trust indenture indicate no intent on the part of the grantor to restrict the authority of the donee of a general testamentary power to appointments of absolute interests, such donee retains authority to dispose of the appointive property in further trust. However, at least one court takes a contrary view, holding that, where it does not appear that the donor of a special power of appointment intended the donee thereof to exercise such power by an appointment in further trust, any attempt by the donee to do so is invalid.

FOOTNOTES:

n1 Phipps v. Palm Beach Trust Co., 142 Fla. 782, 196 So. 299 (1940); Regents of University System v. Trust Co. of Ga., 186 Ga. 498, 198 S.E. 345, 121 A.L.R. 125 (1938); In re Spencer's Estate, 232 N.W.2d 491 (Iowa 1975); Marx v. Rice, 1 N.J. 574, 65 A.2d 48, 9 A.L.R.2d 584 (1949).

Unless there is language specifically to the contrary, a general or special power of appointment may be exercised in favor of a trust, as long as the objects of the power are satisfied. Lilly v. Citizens Fidelity Bank and Trust Co., 859 S.W.2d 666 (Ky. Ct. App. 1993), as modified on other grounds, (May 21, 1993).

n2 Regents of University System v. Trust Co. of Ga., 186 Ga. 498, 198 S.E. 345, 121 A.L.R. 125 (1938); Marx v. Rice, 1 N.J. 574, 65 A.2d 48, 9 A.L.R.2d 584 (1949).

n3 Lehman v. Spicer, 188 A.D. 931, 176 N.Y.S. 445 (2d Dep't 1919) (note: decisions combined in n.y.s.).

n4 First Nat. Bank of Arizona v. First Nat. Bank of Birmingham, 348 So. 2d 1041 (Ala. 1977); Slayton v. Fitch Home, 293 Mass. 574, 200 N.E. 357, 104 A.L.R. 669 (1936).

n5 Old Colony Trust Co. v. Richardson, 297 Mass. 147, 7 N.E.2d 432, 121 A.L.R. 1218 (1937); In re Kennedy's Will, 279 N.Y. 255, 18 N.E.2d 146 (1938).

n6 Matter of Moore, 129 Misc. 2d 639, 493 N.Y.S.2d 924 (Sup 1985).

n7 Loring v. Karri-Davies, 371 Mass. 346, 357 N.E.2d 11, 94 A.L.R.3d 884 (1976).

REFERENCE: West's Key Number Digest, Powers [westkey]19
West's A.L.R. Digest, Powers [westkey]19
A.L.R. Index, Power of Appointment and Alienation
West's Key Number Digest, Powers [westkey]19
West's A.L.R. Digest, Powers [westkey]19

American Jurisprudence, Second Edition

Laura Dietz, J.D., and Jeffrey J. Shampo, J.D.

157 Generally

Inasmuch as the donee of a general power of appointment has an unrestricted discretion in the choice of objects, the distinction between exclusive and nonexclusive powers has no application to general powers. Special powers of appointment, however, may be classified as exclusive or nonexclusive.

Definition: "Exclusive powers"are those in which the donee of the power is authorized to select the members of the class of objects who are to take, excluding some if he or she wishes, although under nonexclusive powers, there must be distribution to each member of the class of objects, the donee's discretion, if any, being limited to the choice of the proportions that each is to receive.

The donee of a power of appointment in exercising the power may exclude one or more of the objects from receiving an interest in the appointive assets unless the donor specifies the share of the appointive assets from which an object may not be excluded. If the donor does not specify any such share, the power is exclusive. If the donor specifies the share of the appointive assets from which an object may not be excluded by an appointment, the donee may not defeat the donor's manifested intent by an exercise of the power. The power is nonexclusive.

Observation: Some statutes state that unless the donor expressly provides otherwise, the donee of an exclusive power may appoint all of any part of the appointive property to one or more of the appointees to the exclusion of the others, although the donee of a nonexclusive power must appoint in favor of all of the appointees equally.

Where a power is found or determined to be nonexclusive, the exclusion of any member of the designated class in making the appointments invalidates the attempted exercise of the power.

158 Presumptions as to donor's intent

Although an express presumption in favor of a nonexclusive construction has rarely been recognized, most of the earlier cases appeared to lean toward that construction. This inclination has often been criticized because it tended to deprive the donee of the power of any discretion in the choice of objects, contrary to the intent and purpose of the power. This contributed to legislative directives on the construction of powers. The Restatement Second adopted a rule to the effect that a power is presumptively exclusive, in the absence of a contrary intent manifested by the donor. Moreover, later decisions have shown a tendency to follow the Restatement rule.

159 Construction of particular powers

Whether a power is exclusive or nonexclusive is, in the absence of statute, governed by the intention of the donor as determined from the language used in creating the power. Although the courts in the earlier cases tended to read such language technically and inclined toward a nonexclusive interpretation, the courts in later cases have tended to construe the creating language broadly, in the light of the donor's intentions as revealed by the entire instrument in which the power is granted, taking the view that the devise of powers is designed generally to permit a discretionary distribution in the light of circumstances developing after the creation of the power.

There seems to be general agreement that where the power is to appoint to or among such of the class as the donee

may designate, an exclusive power is intended. Sometimes the use of the words "any of" in describing the objects of a power has been taken as indicative of its exclusive nature. Moreover, the use of the word "or" in creating a power to appoint to a son or daughter has been held to evidence an intention of an exclusive power. Furthermore, there can be no doubt that where a donee is given a power to appoint to all or any one or more of a class, he or she may appoint to one or more, to the exclusion of the others. Of course, if the donor expressly provides that there may be exclusions, there is no objection to the execution of a power in favor of less than all of the class.

A will that bequeathed property to the executor and that stated that, if such executor so desired, she could sell, at anytime, any of the property and that the proceeds from the sale thereof were to be given to the organizations to which the executor knew that testator was interested in contributing, and that then named a number of organizations that would take in default of appointment, was held to have created a testamentary, special, exclusive power of appointment. It was special in that the number of possible takers was limited to a defined class specified in the will, and it was exclusive in that the will gave the executor complete discretion to appoint property to any particular class member in any amount she desired or to not appoint any property whatsoever.

160 Distribution among or between class or individuals

Perhaps the most common form of a power of appointment is for a distribution among the objects as the donee directs. Some cases have construed such language to confer an exclusive power. However, other cases have taken the view that such language showed an intention that the power be nonexclusive, and the Restatement apparently approves this view.

161 Illusory appointments

Definition: An "illusory appointment" is one whereby a nominal benefit is given to one of a class, to all of whom a substantial benefit was intended.

Like many other theories that are very plausible in the abstract, experience has shown that the doctrine of illusory appointments is difficult in application because the term "illusory" is vague and indefinite. Also, because of the difficulty of formulating rules for determining what is an illusory appointment and the evils resulting from attempts to substitute the judicial will for the intent of the donor and donee of the power, the doctrine has been condemned or rejected by many courts. In some jurisdictions, the doctrine has been abolished by statute. In any case, it is beyond question that the illusory appointment doctrine is applicable only to the exercise of nonexclusive powers.

The appointment of a very small share is not regarded as illusory where a separate provision for the recipient has been made out of the property subject to the power or, it seems, out of the donee's own property, or even out of the donor's property.

162 Appointment to nonobject of power

Where a power of appointment is limited to the nomination of certain persons from a class or from persons named or indicated by the donor, the selection of outsiders cannot be sustained as a valid exercise of the power. If the donee of a special power appoints a beneficial interest to a nonobject of the power, the appointment is ineffective, the rationale being that the donee is acting for the donor to complete a transfer made by the donor, that the donee's range of choice of beneficiaries is defined by the donor in the description of the objects of the power, and that such description, as interpreted by the courts as to its scope, is controlling on the donee. However, where the person who would take in default of a valid exercise of a power of appointment does not question the validity of an appointment to nonobjects, it has been held that the appointment may stand.

Where the will of a donor of a power of appointment expressly stated that in no event should certain designated persons be entitled to any share or interest in any of the appointive property, the donor's intention was quite clear and the court has no power to frustrate that intention and devise or approve of a different method not in harmony with such intention.

In some jurisdictions, the exercise of a power of appointment in favor of some persons who are not permissible appointees is not void, nor need such overextensive exercise of power give rise to the necessary implication that the donee did not intend to exercise the power.

163 Appointment to object for benefit of nonobject

If the donee makes an appointment to an object and the donee's purpose is to circumvent the donor's intention in limiting the appointment to specified objects, the appointment is ineffective to whatever extent it was motivated by that purpose.

Attempts to appoint property so as to benefit nonobjects other than the donee him- or herself are, in general, frauds only in a technical and peculiar sense, and in determining whether an attempted exercise of a limited power is invalid for fraud, with reference to the benefiting of nonobjects, it is necessary to consider what the terms and purposes of the power are and whether what has been done by the appointor thereunder is a genuine appointment, fairly in pursuance of those terms and purposes.

Observation: If a purpose foreign to the power has entered into the act of appointment, a further question arises whether that purpose permeates and vitiates the whole act or whether, on the contrary, it affects only a part, and the court can see to what extent there is a genuine appointment and to what extent the act of the appointor is spurious and must fall. The questions arise whether the appointment is made pursuant to a bargain with the appointee or other person or whether the case is merely one of a condition, request, and the like, attached to the act of appointment. The doubts that arise concern matters of fact or of inference rather than the law. Ordinarily, the circumstances of different cases are to be carefully compared or contrasted. In some instances, circumstances are unique, and a decision is to be made almost wholly in the light of fundamental principles. There is no blind rule of thumb by which cases may be well decided.

There is no dissent from the proposition that mere knowledge on the part of the donee that his or her appointee will transfer the property to, or will therewith otherwise benefit, one not an object of the power does not vitiate the act of appointment.

164 Antecedent agreement as to appointee's disposition

There is no doubt that an appointment under a limited power is void in toto if the fact appears that it was made pursuant to an agreement or understanding that the appointee should benefit a nonobject and that, except for such understanding, the appointment would not have been made at all. Moreover, if a part of property appointed is appointed under an arrangement providing that the appointee shall benefit one not an object of the power and if it is impossible to say what part would have been appointed in the absence of the agreement, the appointment fails in toto.

165 Effect on fiduciary and purchasers without notice

A fiduciary who transfers property to the appointee intended for the benefit of a nonobject will not be considered to have committed a breach of trust unless the fiduciary knows or has reason to know that the appointment is in fraud of the power. Moreover, the appointment, although ineffective as to the appointee, will be effective as to any purchaser of the appointed interest for value and without notice of the fraud.

Practice Guide: Where the appointee has transferred to a bona fide purchaser, the persons entitled to the appointive assets may recover from the appointee the consideration received for the property or the value of the property, whichever is greater.

166 Fraudulent or bad-faith appointment; undue influence

If a power to appoint is not exercised in good faith and for the purposes created, the attempted exercise thereof is deemed ineffective.

A power of appointment is fraudulently exercised not only where the donee acts corruptly for a pecuniary gain, but also where he acts primarily for his own personal advantage or for that of a third person who is not an object of the power. Where a power of appointment is given to a person for the benefit of others, any transaction between the donee of the power and the beneficiaries, in pursuance of which the donee of the power exercises the appointment for his or her own benefit, vitiates such an appointment.

167 Generally

When a power of appointment is exercised, the property passes to the appointees, resulting in a vesting of valuable property rights in those persons in whose favor the power is executed. Thus, if a general power of appointment is exercised in favor of volunteers, the property subject to whatever charge creditors of the donee may have against it goes not to the next of kin or the legatees of the donee, but to the appointees under the power. The exercise of a power to appoint by will is not the equivalent of a gift of the donee's own property.

Those who take by the exercise of a power of appointment are estopped by the actions of the donee from objecting to a breach of trust because no one can take a better title than that of his grantor.

The execution of a will purporting to be an execution of a power created by the will of donor, who provided a disposition of the property to certain named person in case of failure to exercise the power, is a revocation of such disposition by the will of the donor where the will of the donee expressly provides that the several persons so named shall receive no part of the estate.

168 Doctrine of relation back

The main strut in the ancient superstructure of powers is the "relation back doctrine." This doctrine has been expressed in two forms: (1) that the appointee of the property takes directly from the donor of the power rather than the donee because property subject to a power of appointment is regarded as the property of the donor, so that in exercising the power the donee is disposing of the donor's property; or (2) that the instrument exercising the power is to be read as part of the instrument creating the power. The exercise of the power of appointment was viewed as a shifting event, much as any other shifting executory interest was viewed. The doctrine of relation back, minimizing as it does the importance of the donee of the power, is the mainstay for that rule of law that treats the donee as a mere conduit or agent for the donor with no property interest. The donor speaks through the donee when the donee exercises the power of appointment. The doctrine is founded on a strict, theoretical analysis of the grant of a power, the exercise thereof, and the estates created thereunder.

Observation: It has been noted that the doctrine of relation back has spawned a variety of problems and can often lead to incongruous and even absurd results and, consequently, has long been criticized. It has further been said the doctrine has a modicum of reality only insofar as a special power is concerned, but when the power is a general power, the doctrine is unsound.

169 Operation and effect of doctrine

By reason of the relation back doctrine, the appointee of a power possessed by a person who has no estate in the property takes title from the person in whom the title is vested. An appointee under a power, even though he or she is a child of the donee, does not take by descent from the donee, but by purchase from the donor of the power.

On the other hand, the view has been held that whatever the technical source of title of a grantee under a power of appointment, in reality and substance, it is the execution of the power that gives the grantee the property passing under it. Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, the execution of the power is considered the source of title for some purposes.

170 Exceptions to doctrine

There are a number of recognized exceptions to the doctrine of relation back that permit property subject to a power of appointment to pass as part of the donee's estate. One exception arises when the donee of the power shows an intention to make the appointive property pass as part of his or her estate. This will occur, for example, if the donee masses the appointive property with his or her own, as by a residuary appointment or by referring to it as his or her own. In such a case, the donee's wishes will be given effect, and his or her executor will possess and administer the appointive fund along with the other assets of the estate.

A second exception arises when a donee of a general power of appointment has executed the power in favor of volunteers, that is, other than his or her creditors; if the donee's own estate is insufficient to pay its creditors, the property subject to the power will be considered an equitable asset of his or her estate for the benefit of creditors, and the appointees will take subject to the claims of the creditors.

Another instance of erosion of the doctrine appears in the field of taxation. The doctrine was raised as a technical objection to the imposition of a transfer tax in the donee's estate, the tax having been levied pursuant to a tax statute that did not exist at the time of the donor's death, clearly raising constitutional questions stemming from the relation back doctrine. In disregarding the doctrine, the courts, including the Supreme Court of the United States, emphasized that the transfer was an act of the donee of the power, under his or her own will, with the property entitled thereto passing by his or her own act, not the donor's.

A person deriving title under an appointment is considered as claiming under the donee within the meaning of a covenant for quiet enjoyment.

A further exception to the doctrine is shown by a case in which it was held that the trustee named by the donee that was entitled to the appointive fund without qualifying and receiving letters of trusteeship in the estate of the donor, the court noting that if as a result of the relation back doctrine, the trustee was forced to qualify and receive its letters in the donor's estate in order to administer the appointive fund, awkward administrative features would follow, and it was unreasonable to attribute to any donor or donee an intent to spawn such an impractical and uneconomical operation.

171 Lapse of appointments

An appointee under a power must be living at the effective date of the appointment so that, where an appointment is made by will in favor of one who predeceases the testator, the appointment lapses. An appointment to a person who is dead is ineffective except as provided by an antilapse statute.

Comment: The donee may manifest an intent to substitute an alternative taker for the originally named appointee if the latter should die before some specified time, but the alternative appointee must be an object of the power and must not be dead at the time of appointment. Otherwise, the donee may intend that, if the appointment is

ineffective because the appointee is dead, the appointment shall be to the donee's estate, and this intent clearly manifested would be an effective appointment if the donee's estate is an object of the power.

172 Effect of antilapse statutes

Statutes, commonly referred to as antilapse statutes, provide substituted takers in the event a devisee or legatee dies before the will takes effect, unless a contrary intent is manifested. Those statutes, if not made expressly applicable, should nevertheless have their purpose and policy applied:

(1) to an appointment to an object of a power as if the appointive property were owned by either the donor or the donee; and
(2) so that the substituted takers are regarded as objects of the power.
Comment: The rationale for the rule is that the substitution of alternative takers provided by an antilapse statute, if the originally named devisee or legatee dies before the will takes effect, is based on the theory that the decedent whose will is involved would most likely have intended such result, if the possibility of the designated beneficiary dying before the will took effect had been considered. However, the result provided by the antilapse statute is applicable only if the disposition under the will does not manifest an intent that the antilapse statute not apply; such manifestation of intent is present if the will specifically provides for an alternative taker if the originally designated taker does not survive the decedent whose will is involved. If the will provides that the named beneficiary is to take "if he [or she] survives the testator," this shows the decedent recognized the possibility the named beneficiary might not survive and did not choose to provide an alternative taker, and the decision in this situation not to provide an alternative taker eliminates the applicability of the antilapse statute.
Observation: The donor of the power and the donee of the power may reside in different states. The appointive property may be real property or something other than real property. In view of the fact that antilapse statutes in the various states vary in the scope of their applicability, the applicable antilapse statute will be the one that would apply if the donee of the power owned the appointive property and made the disposition described in the appointment.

Antilapse statutes have been held to apply to appointments made under general powers of appointment, but not to appointments made under special powers of appointment.

173 Generally

Commonly, at least in the absence of words indicating a contrary intent on the part of the donor, a single power of appointment is intended to be and can be exercised only once over the same property interest.

In the comparatively few cases in which the courts have had occasion to consider the question of the revocability of an inter vivos exercise of a power of appointment, the rule of irrevocability has generally been afforded recognition. However, although apparently recognizing, as a broad legal principle, the view or rule that where a power is exercised by an inter vivos instrument, unless a power of revocation is reserved therein, the appointment cannot subsequently be revoked, the courts in some cases have concluded that, under the terms of the particular instruments which they were called upon to consider and interpret, a continuing or successive right or power of revocation had been expressly or impliedly intended and retained and that, as a consequence, the general rule was inapplicable and, even though the specific instruments by which the powers of appointment were actually exercised in those cases contained no express reservation of the right or power to revoke, the donees of the powers had the right, by later instruments, to revoke such prior appointments.

Where there is a power of appointment at the death of the donee by his or her last will, the last will, making a valid exercise of the power, supersedes any prior attempt to exercise it.

174 Subsequent marriage or birth as revocation

At common law, although the will of a man was not revoked by a subsequent marriage alone, both marriage and birth of issue being necessary for revocation, the will of a woman was deemed revoked by her subsequent marriage unless the will was made in the exercise of a power of appointment. Under one state's pretermitted heir statutes, a will was not revoked by a testator's subsequent remarriage and the birth of child, and the article of a will that exercised a power of appointment reserved to the testator under an insurance trust was effective.

Observation: A will revoked by a subsequent marriage is revoked in toto, and a testamentary power of appointment cannot be exercised by a revoked will.

As to the effect of a subsequent birth of a child on the exercise by will of the parent's power of appointment, the courts have reached varying results based upon the construction given the applicable statutes enacted for the benefit of afterborn or pretermitted children. Thus, it has been held that, under a statute providing that an afterborn or pretermitted child not provided for by will or settlement is entitled to an intestate portion of the parent's estate, a will made in the exercise of a power of appointment was not revoked by reason of a subsequent birth of a child because such child was entitled by statute to a share of the parent's inheritable estate only, and not to a share of the property subject to the power of appointment that was not part of the parent's own estate. However, some courts have held that a will made in the exercise of a power of appointment was revoked upon the subsequent birth of a child to the testator or testatrix by reason of a statute providing that the birth of a child renders inoperative as to such child a will previously made containing no provision for the child.

175 Partial appointment

The question whether a power of appointment may be exercised in part only by an act not purporting to be exhaustive is one of true construction of the language and instrument creating the power. Most powers may be partially exercised, which circumstance one may be tempted to express in terms of a general rule, despite the fact that neither in reason nor in the circumstances or holdings of the cases is there anything to show that the matter is governed by rule. Clearly it is governed by the evidence or presumable intent of the donor of the particular power. The circumstance, standing alone, that power is given to dispose of the whole of designated property appears to justify the inference that power is given to dispose of any part or item of it. However, any such inference may be foreclosed by the terms and intent of the given power. Apparently, a general power is less readily construed as subject to the requirement of total exercise than one to appoint merely among particular individuals or a class.

Ordinarily, however, the donee of a power to appoint the whole of property among particular persons or a class may validly appoint lesser interests only, leaving corpus or remainder unappointed.

176 Generally

The question whether the individual estate of a testator may be said to be blended or merged with an estate over which the testator had a general power of appointment, exercised (expressly or without reference thereto) by a residuary clause, so as to authorize, in the event of the insufficiency of the individual estate, the payment of the pecuniary general legacies out of such blended fund before the residue is determined, is one of intention, which, in the absence of an unequivocal expression of intent, must be determined by examination of the will as a whole and by inference from relevant attendant circumstances. Thus, the proper test for determining whether there has been a blending of the two estates sufficient to imply appointment to the donee's estate is whether the donee has treated the two estates as one for all purposes and manifested an intent to commingle them generally. In some instances, there may be a partial merger or blending of the donee's estate with the appointive property.

Except in the rare circumstance that the donor's will so permits, the donee of a special power has no authority to merge or blend the appointive property with his own and so avoid administration in separate courts or different states.

Practice Guide: However, it has been suggested that a request be made to the court ordering the transfer of the appointive property to the trustees appointed in the donee's estate without requiring them to qualify in the donor's estate even if the donee's will has not effected a merger with the donee's general estate, and this practice might very well be followed particularly where the estates are administered in different counties or different states and where there is consent by the parties. Of course, all estate taxes would have to be paid in the state before the transfer will be permitted.

177 Effect of sufficiency or insufficiency of donee's owned assets

Insufficiency, at the time of the making of the will, of the donee's individual estate to pay the general pecuniary legacies is a circumstance (although not conclusive) that may be considered as favorable to an intention for the blending of the estates and for payment of such legacies out of such estate before the residuary estate is determined. On the other hand, the sufficiency, at the time of the execution of the will, of the individual estate to pay the pecuniary legacies has been regarded as a circumstance indicating an intention contrary to the blending of the individual estate with the appointive estate and as negativing an intent that the pecuniary legacies should be paid out of the appointive estate.

178 Direction for payment of debts or taxes

When the donee's will directs payment of debts, expenses, and taxes before making mention of appointive property or before any attempt occurs at combining owned and appointive property, no intention to blend the two estates will be implied. No purpose to subject an estate over which a testator had a power of appointment to the payment of debts is evidenced by the fact that, in event of the death of the primary beneficiaries of a gift of all the testator's estate and the appointive estate, legacies were given to others in an amount exceeding the value of the individual estate.

Where the donee of a special power of appointment directed that the appointed property be merged with and disposed of as part of an existing trust and the beneficiaries of such trust were permissible objects of the special power, but the donee further directed the executors to require the trustee of the trust to contribute such amounts as may be needed by the executors to pay all expenses, taxes, and charges and to satisfy all bequests and devises, it was held that the donee exceeded the special power by subjecting the appointed property to creditor and tax claims contrary to the express terms of the power as created by the donor.

179 Selective allocation of blended assets

Where the donee of a power of appointment blends owned and appointive assets into a single fund and then makes a common disposition of such fund as an entity but the appointment is invalid for some reason, the courts in a few jurisdictions have applied the doctrine of selective allocation, or marshaling, to avoid or ameliorate the effect of such invalidity, most often arising from a violation of the rule against perpetuities, whether statutory or common law. The doctrine, when so applied, is a rule of testamentary construction. It is invoked to carry out the intent of the testator, the donee of the power of appointment, where that intent is thwarted by the application of a rule against perpetuities. Selective allocation is but an equitable application of the well-established principle that the expressed intent of the testator will govern, if not contrary to some positive rule of law. The doctrine proceeds on the theory that, when a donee of a general testamentary power of appointment exercising that power in his will, but without specific direction as to the allocation of the assets derived from the exercise of the power, he expresses an intent to, and does, blend those assets with the assets of his or her estate into a single fund. If, by so doing, he or she violates the applicable rule against perpetuities, the appointive assets are, where it is possible, allocated to the various dispositions in the will in such a manner as to avoid the result of the violation and give full effect to all the dispositions as the donee-testator intended.

The doctrine will not be applied unless there is a common disposition embracing both valid and void gifts, and the testator intended to blend the appointive assets with his own. Necessarily, such an intent cannot exist unless he or she intended to exercise his power of appointment.

180 Under general power

If the donee of a general power of appointment blends owned and appointive property in a common disposition, the blended property is allocated ratably to the various interests, including claims of creditors, taxes, and expenses of administration, under the common disposition, except to the extent a different allocation increases the effectiveness of the common disposition. In that case, a selective allocation of the blended property to the various interests under the common disposition is deemed to be made to increase effectiveness, unless the donee manifests a contrary intent.

181 Under nongeneral power

If the donee of a nongeneral (special) power of appointment blends owned and appointive property in a common disposition, the blended property is allocated ratably to the various interests under the common disposition, except to the extent a different allocation increases the effectiveness of the common disposition. In that case, a selective allocation of the blended property to the various interests under the common disposition is deemed to be made to increase effectiveness, unless the donee manifests a contrary intent.

182 Generally

Whether, notwithstanding the invalidity of some provision or provisions in attempted exercise of a power of appointment, other provisions may take effect, wholly or in part, ordinarily depend upon whether the valid provisions are severable from the invalid ones. Accordingly, where a person purporting to execute a power has done something that is within the power and something outside the power, then, if the things are distinguishable, the execution within the power is good and the excess void, but, if the boundaries between the excess and execution are not distinguishable, the execution will be void in toto. Whether separability is possible is determined from the donee's intent as ascertained from the donee's will.

Under the "capture doctrine," where the donee of a general power attempts to make an appointment that fails, but the donee has manifested an intent wholly to withdraw the appointive property from the operation of the instrument creating the power for all purposes and not merely for the purposes of the invalid appointment, the attempted appointment will commonly be effective to the extent of causing the appointive property to be taken out of the original instrument and to become in effect part of the estate of the donee of the power. The application of the capture doctrine captures the property that is the subject of the power of appointment that fails and makes it part of the donee's estate.

Observation: If one part of an appointment is ineffective and another part, if standing alone, would be effective, the effective part is given effect, except to the extent the donee's scheme of disposition is more closely approximated by allowing some or all of the effective part to pass in default of appointment.

General propositions with reference to severability or nonseverability do not, however, throw much light upon many and varied problems of the cases, for in reality the subject under treatment embraces many subjects and a wide assortment of distinctive questions, factual as well as legal. In some instances, the problem may not be one of severability. For example, where a power is exercised for a purpose constituting a fraud on the power, the question presented may be merely whether such purpose relates to the entire act of appointment or only to some part of it. Furthermore, certain peculiar effects are produced by contraventions of the rule against perpetuities, although appointments of shares valid in themselves have been upheld notwithstanding the appointment of other shares failed for remoteness.

In some instances, of course, the valid and invalid provisions in exercise of the power are so interdependent that the former cannot be sustained consistently with the donee's intent. On the other hand, a provision in mere excess of a power does not ordinarily render an appointment void. Moreover, property may be fully appointed under one clause of the instrument of appointment, even though the invalidity of another clause prevents its appointment under the latter.

183 Attempted appointments to objects and nonobjects

Ordinarily, appointments to objects are upheld notwithstanding an attempt was made to appoint interests to nonobjects. Where there is no difficulty in separating that which is well-appointed from that which is not well-appointed by rejecting provisions for persons not objects of the power and where the question then becomes merely whether only a part of the objects of the donee's favor shall be disappointed, or whether the entire exercise of the power shall fail, there is no doubt that it is the duty of the court to make the separation and to give effect to the provisions that fall within the scope of the power, unless, in the absence of any direction by the donee, the estate would be cast more nearly in the manner in which he attempted to transmit it than would result from effect being given to a part only of the appointment.

184 Invalid remainder or limitation over

Almost invariably the appointment of a life interest in itself valid is held good notwithstanding the remainder is invalidly appointed. Thus, a testatrix's appointments in trust for her children have been upheld, even though the designation of contingent remaindermen -- who were ineligible takers -- was invalid.

185 Invalid conditions, provisos, and the like; fraud

Ordinarily, in the absence of fraud attempted for the benefit of the donee, unauthorized conditions and provisos annexed to an appointment will be stricken so as to let the appointment stand. In many cases, fraudulent agreements, conditions, or charges for the benefit of the donee or his estate have been regarded as of such a character as not to affect that validity of the rest of the appointment.

On the other hand, appointments subject to agreements, conditions, or charges for the benefit of the donee or his estate have been held so fraudulent as to be wholly invalid.

186 Generally

An illegal or invalid appointment is equal to nonexercise or no appointment and constitutes a default. The rule is that, when an attempted appointment in pursuance of a general power completely fails, the subject of the power devolves uninfluenced by the attempt. In case of failure of remainders attempted to be created by the donee of a power, the estate represented by them will be distributed according to the provisions of the will of the donor of the power where it attempts to dispose of the estate in case the power is not exercised.

Where a testator created a discretionary power of appointment with respect to his residuary estate, directing his executor to determine to appoint the property to the person or persons who performed the major part of caring for the testator during his declining years, the court suggested that it would be preferable for the donee-executor to file, in the probate court, an acknowledged instrument formally stating his decision and election that no person or persons aside from the testator himself performed the major part of caring for him during his declining years and that the executor has therefore declared that no person or persons were or are eligible to receive the residue of the

estate, whereupon such residue would pass under the intestacy laws.

187 Taking property out of donor's estate or creating instrument where appointment fails as to one or more appointees; devolution

A problem arises as to when property subject to a general power of appointment is, by the action of the donee in purported execution of the power, taken out of the estate of the donor or, as sometimes expressed, "out of the instrument creating the power," notwithstanding that by reason of the death of one or more of the appointees in the lifetime of the donee, or from any other cause, the appointment wholly or partially fails to take effect in the manner particularly intended. The cases show that it is possible for a general power to be executed in a twofold sense, namely, by the donee's electing, in effect: (1) to make the property his own for all purposes of devolution (as by appointing it to a trustee or to his executors for the payment of debts, or in other ways); and (2) to further appoint the property to particular objects. Where the acts of a donee in making an appointment are regarded as having such double aspect, the property is regarded as taken "out of the instrument creating the power" so that, upon failure of the objects particularly designated to take the property, it passes either under the residuary provisions of the will or other instrument of appointment or devolves upon the next of kin or heirs at law of the donee. In this connection, the Restatement Second of Property provides that, if the donee of a general power of appointment makes an ineffective appointment, the ineffectively appointed property passes to the donee or the donee's estate rather than to the takers in default of appointment, if the donee's appointment manifests an intent to assume control of the appointive property for all purposes and not merely for the limited purpose of giving effect to the expressed appointment.

The general doctrine that the attempted exercise of a general power, although failing as to one or all of the particular beneficiaries designated, may be effective to take the property out of the instrument creating the power has received comparatively little attention in this country, but it has been recognized in a few cases. In some of the cases recognizing the doctrine, initial importance is attached to a default-of-appointment clause where found in the instrument creating the power, and the view is taken that the doctrine does not apply where there is such a clause.

As commonly expressed, the question whether an appointment operates in any event to take the property out of the instrument creating the power is a question of the intention of a donee as shown in the instrument of execution. [n5] Moreover, the frequency with which appointments that fail as to the designated objects are, nevertheless, held to take the property out of the estate of the donor suggests a tendency of the courts to lean toward that construction where it can reasonably be supported under the authorities.

It has been stated that the rule as to when property is taken out of the instrument creating a general power bears some analogy to the rule as to when property is held for the payment of the debts of the donee who exercises a general power of appointment.

188 Particular circumstances indicating donee's intention

Although there is no hard and fast rule on the subject, the cases show that, in general, one of the strongest circumstances indicating the so-called "intention" of a donee to take property out of the instrument creating the power, for all purposes and not merely for the limited purpose of benefiting the particular objects designated, is the blending in the instrument of execution of property subject to the power with other property, as where the donee masses indiscriminately for division and distribution his or her own property with property subject to the power, or gives all of such property to one person, or charges it all with his or her debts, etc. Moreover, because the ultimate question in cases of the kind under consideration here is whether the donee intended to make the property his or her own for all purposes, if he or she, in the instrument of execution, refers to the property as being his or her own, such circumstance is ordinarily considered significant. Giving one's executor a fund subject to a general power of appointment is regarded as almost conclusive that it was the testator's intention to treat it as part of his or her own estate.

189 Effect of appointment in trust; necessity

Where the donee appoints the property upon trust for designated beneficiaries (or even, it has been held, upon trust without indicating the objects of the trust) or where he or she similarly appoints it to his or her executors as such, it has usually been held that the property is taken for all purposes out of the instrument creating the power. Although the determination whether the property is thus taken out of such instrument is commonly regarded as depending upon the intention of the donee, the appointment of a trustee is ordinarily regarded as a circumstance warranting a presumption or inference of an intention to take the property for all purposes out of the instrument creating the power, but the presumption or inference may be rebutted by other circumstances.

Although the appointment of property to a trustee, with or without an attempted designation of objects, is a circumstance of great importance as indicating a so-called "intention" of the donee to take the property for all purposes out of the instrument creating the power, quite a number of English cases, and a few American cases, clearly establish that such an intention may be shown without a trusteeship appearing. It has been, in effect, declared that even where there is no intervention of a trustee but the donee by his or her will appoints directly to beneficiaries, one of whom dies in his or her lifetime, the property so failing of appointment will go to those persons who take the property of the donee, if it appears from the will that the donee meant in the first place to make the fund for all purposes his own, and in the next place, to dispose of it in a particular way.

190 Effect upon rights of donee's creditors

Where the donee of a general power of appointment makes an appointment that fails as to the beneficiary but is held to take the property out of the instrument creating the power, it would seem that the property that is the subject of the power may inure to the benefit of the donee's creditors, to the extent, at least, that his or her own property is insufficient to discharge the creditors' claims. Such, in fact, seems to be the plain import and general assumption of the decisions, although they are somewhat wanting in direct language on the point.

191 Generally

Ordinarily, where a power of appointment is unexercised, it becomes inoperative, and if a general power is not exercised, the property subject thereto goes according to the disposition of the donor. Thus, if the donee of a general power, exercisable by will or other writing, has made no attempt to exercise it and there is no gift in default of appointment, it is plain that the design is to leave the devolution of the property, which is subject to the power, entirely to the law governing the estate of the donor of the power. It has been said that the failure of the donee of a power to exercise it is just as effective to vest ownership of the property in the successors as the exercise of the power. The control of the succession is in the donee. The donee, practically, selects the successors by his or her failure to act.

Where the exercise of the power of appointment by the donee is void ab initio because of undue influence and illegal conduct by the named appointee, this constitutes a failure to exercise the power and those named as takers in default of appointment under the will of the donor of the power are entitled to the appointive property.

To the extent the donor of a general power has not specified in the instrument creating the power who is to take unappointed property, the unappointed property passes to the donor or the donor's estate.

Comment: In other words, there is a reversionary interest in the donor or the donor's estate as is the case when any transferor has made an incomplete disposition of property.
Observation: The phrase "in default of appointment" presupposes that there was a valid power of appointment either that was not exercised at all or that was exercised in a defective manner so as to render that purported exercise void. If there was no valid testamentary power of appointment initially, there could be no default of appointment.

192 Express default-of-appointment provision

Where a power of appointment is not exercised and there is a gift in default of appointment, the property passes according to such gift.

193 Status and rights of takers in default

Those who take in default of the exercise of a power of appointment take from the donor, not from the donee of the power. Moreover, takers in default of appointment become immediately vested, subject to divestment by execution of the power, and their interest is alienable and devisable by them, although it will not vest in possession unless and until the holder of the power of appointment does in fact fail to exercise the power.

Persons taking in default of appointment under a general power are not bound by the actions of the donee of the power in consenting to or ratifying a breach of trust by the trustee and surcharging such trustee for losses resulting from such breach.

194 Disposition of property where taker in default is an appointee

If a taker in default of appointment is also an appointee, the disposition of unappointed property is not affected thereby, unless the donor or the donee manifests a contrary intent.

Comment: Thus, in the absence of any indication of the donor's intent, it is assumed that the donor intends that the taker can take in both capacities, and this necessarily means that the donor contemplated that the taker in default who is an appointee could receive more of the appointive assets than a taker in default who is not an appointee, although the donor can prevent this result by manifesting a contrary intent, thereby restricting the donee's freedom to benefit an object who is also a taker in default in both capacities. Such contrary intent may be manifested by the donor specifying that an appointment by the donee to a person who is both an object and a taker in default of appointment shall eliminate such appointee as a taker in default of appointment with respect to all or some part of any unappointed property. Elsewise, the donor may specify that the appointee is eliminated as a taker in default unless the appointee takes the appointed property into account in determining the appointee's share as a taker in default as though the appointment had not been made. Such provision is known as a "hotchpot clause" and the action of the appointee in electing to take the appointment into account is known as "bringing the appointee's share into hotchpot." If the donee provides in the instrument of appointment that the appointment to an object who is also a taker in default is to be treated as an advancement to the appointee to be taken into account in the distribution of unappointed property to the takers in default of appointment, this manifestation of intent by the donee is controlling, unless it violates some restriction placed by the donor on the exercise of the power.

To the extent an appointee would have taken the appointed property as a taker in default of appointment if the appointment had not been made, the appointee takes under the gift in default of appointment and not under the appointment.

Comment: The Restatement Second points out that legal consequences differ if the appointee takes under the appointment or under the gift in default of appointment. Although the appointee will take the same amount in either case, the donee's creditors will be able to reach the appointive assets only to the extent the donee has exercised the power; if the appointee takes under the gift in default of appointment, the appointee is taking under an unexercised power and the donee's creditors are blocked out.

195 Time of ascertainment of heirs or next of kin taking in default of appointment

Where, upon the failure to exercise a power of appointment given by will, the property subject to the power devolves upon the heirs or next of kin of the testator, a question is sometimes raised as to whether such heirs or next of kin are to be ascertained as of the time of the testator's death or as of some other time. This question usually arises only in cases of default in the exercise of general powers because, in cases of limited powers, a general intention to benefit particular persons, or those who fall within a particular description, is usually inferred, but it may arise in the case of a failure to exercise a limited power, in any instance where the will is not construed as vesting the property in the persons among whom it might have been appointed. According to the rule usually applied, upon a failure to exercise a power of appointment given by will, the property subject to the power devolves by mere operation of law upon those who answer the description of such heirs or next of kin as of the time of the testator's death. However, where the will of the donor, or an instrument executed by the donee in attempted exercise of the power, is effectual to the extent of transferring the fee, subject to more complete disposal by the donee, the general rule to be deduced from the cases is that the heirs or next of kin of the donor, who take the property upon the ultimate failure of the donee completely to dispose of it, are to be determined as of the time such failure takes effect, that is to say, as of the time the fee may be treated as reverting to the estate of the donor.

Under the general rule stated, where the donee of a power is given a life estate in the property subject thereto, under such circumstances that title remains in the testator's heirs or next of kin, a failure effectually to pass the property under the power merely continues the title in such persons, and they are consequently to be determined as of the time of the testator's death. It seems that, in any case, if under the circumstances that have occurred the fee is not regarded as having passed under or by virtue of the will of the donor, it goes to the persons who were the testator's heirs at the time of his decease if the donee fails to dispose of it.

196 Nonexercise of imperative power

A power is deemed imperative not merely when expressly made so; if it appears from the instrument as a whole that an obligation to exercise the power was contemplated by the donor of the power, equity will not permit the objects to be disappointed by a failure to appoint but will distribute the property equally among them. In such case, the power of selection or apportionment, or both, incident to the power cannot be exercised by the court, but the property is nevertheless distributed upon the theory that the donor had an intention in favor of the objects generally, to which was superadded such mere authority to cause an unequal distribution or to exclude some of the objects from participation, as the donee might exercise.

197 Power to appoint among class

The cases show a marked tendency to regard a power to appoint property among a class -- there being no gift over in default of exercise of the power -- as either an implied trust or an implied gift in equal shares in default of appointment.

Observation: The cases generally do not recognize the power to wholly exclude some of the members of a class as negativing the existence of a trust for the benefit of the class. The courts show a readiness to construe a power in terms as being in fact a trust where such appears to be the intent of the donor, even though the donee has no title of any sort to the property to be disposed of.

On the other hand, the principle is recognized that a division among the objects of the power should not be made if it would be contrary to the express purpose of the donor of the power.

198 Nonexercise of nongeneral or special power

When there is a default in the exercise of a special power of appointment and there is no specific language indicating

an express gift in default of appointment, equity courts will distribute the corpus in accordance with the intent of the donor of the power. They do so on one of two theories, either by holding that there is an implied gift or an implied trust. The distinction between the two is often blurred and is without great significance in any event. Ordinarily, the property not appointed goes in equal shares to the members of the class to whom the property could have been appointed.

The Restatement Second of Property provides that, to the extent the donor of a nongeneral power has not specified in the instrument creating the power who is to take unappointed property, the unappointed property passes:

(1) to the objects of the power (including those who are substituted objects under an antilapse statute) living at the time of the expiration of the power as if they had been specified in the instrument creating the power to take unappointed property, if:
(a) the objects are a defined limited class; and
(b) the donor has not manifested an intent that the objects shall receive the appointive property only so far as the donee elects to appoint it to them; or
(2) to the donor or the donor's estate, if the above provision is not applicable.
Observation: In other words, the fact that the donee has failed to apportion property within the class should not defeat the donor's intent to benefit the class.

199 Time of ascertainment of class taking in default of exercise of special power

There is no rule of thumb that can be trusted in determining, in a particular case, the time for ascertaining the membership of a class contemplated by an unexecuted power in trust. That determination is wholly dependent upon a construction of the language of the instrument creating the power. Ordinarily, as a reasonable construction of the instrument creating a power in trust to appoint among a class, by will only, the court, in distributing the property for want of a valid, or any, appointment, will ascertain the membership of the class as of the donee's death, particularly if the donee held a life estate in the property to be appointed.

If an instrument does not contain an express gift of property to any class, but only a power to a person to give it, as he or she may think fit, among the members of a class, it is obvious that only those can take in default of appointment who might have taken under an exercise of the power. It has been said that, in exercising a power given to a third person to distribute property at the time of the life tenant's death, the donee would be confined to the objects living at that time and that it followed that, where the power was limited to a class, the court, upon failure of the donee to exercise the power, would likewise be confined to such objects.

200 Aiding defective exercise

A court of equity will aid the defective execution of a power, and it is immaterial that the defective execution arose from a mistake of law or simply by reason of accident or ignorance. If a power of appointment (POA) fails to satisfy formal requirements imposed by the donor, equity will cure the defective exercise of the POA when the appointment approximates the manner of appointment prescribed by the donor, the named beneficiary is a natural object of the donee's affection, the donee intended to exercise the power and such intent is evident from the document itself, and the donee's intent to exercise the POA does not conflict with the donor's contrary intent.

Observation: A probate court, as a court of equity, has the power to supply any defect in the execution of a power granted a donee.

201 Intent of donee

The donee's intent is relevant to the question of equitable relief. In addition to finding that the beneficiary is a person favored by a court of equity and that the defective appointment approximates the donor's required formality, the

equitable rule also requires the court to determine that the donee intended to exercise the power. The rule confines equitable relief to situations in which the failure to conform to the prescribed formality is the result of oversight rather than intent not to exercise the power. The weight apportioned to donee's intent is not, however, constant. Clearly, if the donee complies perfectly with the formalities, doubt as to the donee's intent to appoint will hardly be raised. The question of the donee's intent is more decisive where there has been imperfect compliance and the appointee falls within the ambit of the equitable exception. If the formality was intended by the donor to prevent inadvertent or unknowing exercise, then the donee's intent is highly relevant.

FOOTNOTES:

n1 Matter of Strobel, 149 Ariz. 213, 717 P.2d 892 (1986).

As to the reasonable approximation of the donor's required formality, generally, see § 74.

REFERENCE: West's Key Number Digest, Powers [westkey]37
West's A.L.R. Digest, Powers [westkey]37
A.L.R. Index, Power of Appointment and Alienation
West's Key Number Digest, Powers [westkey]37
West's A.L.R. Digest, Powers [westkey]37

American Jurisprudence, Second Edition

Laura Dietz, J.D., and Jeffrey J. Shampo, J.D.

202 Compelling exercise of power

Equity will not compel or control the discretion of the donee in the execution of a power of appointment that is purely discretionary with the donee, or exercise it in his or her place, if for any reason the donee leaves the power unexercised. The personal discretion of the donee cannot be judicially controlled as long as it is exercised in good faith. Thus, for example, it has been held that a bankruptcy court could not compel the debtor's parent to exercise a discretionary power of appointment. [n3]

On the other hand, there are cases in which discretionary powers are also trust powers, which can and will be enforced by a court of chancery. Although a court will never interfere with the exercise of a discretion that has been conferred by the author of a trust as long as it is fairly exercised, yet there are cases in which the court will prevent its improper exercise and will itself exercise it when the person on whom it is conferred refuses to do so, or is prevented by death or otherwise from doing so. The case in which a husband by his will gives property to his wife during her life, in trust for the support of herself and her children according to her discretion, is a familiar case of this kind.

Should a donee fail to exercise an "imperative" power, the court will do so, and when a donee fails to exercise a power that is both "imperative" and "exclusive," the court will exercise such a power for the benefit of all appointees equally.

203 Restraining execution of power

Courts will not ordinarily interpose to restrain the execution of a power, except where abuse of discretion, bad faith, or fraud is shown, or where the power is attempted to be exercised in a manner different from that authorized by the donor.

204 Acceptance by appointee

The transfer of property by appointment requires not only an affirmative act by the donee of such power but also the acceptance of such bequest by the appointee as well, and without the latter, there is not a completed gift, but only an attempt. Although the acceptance of a beneficial gift may in some instances be presumed in the absence of an expressed contrary intent, an appointee is under no duty to accept such a gift, and ownership thereof may not be vested in the recipient against his or her wishes. An appointee may renounce the appointment.

Practice Guide: Contingent appointees under a general power of appointment have sufficient standing to question the alleged waste, mismanagement, and dissipation of the assets comprising the appointive estate.

205 Renunciation or disclaimer

One to whom property is appointed in exercise of a power, general or limited, has the right to renounce the

appointment. However, one other than the appointee cannot renounce the appointment.

A person who would otherwise be an object of a power can avoid becoming an object, or a person who would otherwise be an appointee under an exercise of the power can avoid becoming an appointee, by a disclaimer.

206 Uniform disclaimer acts

The Uniform Disclaimer of Property Interests Act (1999) (which has been incorporated into the Part 11 of Article II of the Uniform Probate Code) applies to disclaimers of any interest in or power over property, whenever created. The applicable provisions (Uniform Probate Code Article II, Part 11 (Uniform Disclaimer of Property Interests Act (1999))) are supplemented by law and equity principles and do not limit the right of any person to waive, release, disclaim, or renounce an interest in or power over property under any other law. A person, including a fiduciary, may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim. A disclaimer made under this part of the Uniform Probate Code (Uniform Disclaimer of Property Interests Act (1999)) is not a transfer, assignment, or release.

Upon the death of a holder of jointly held property, the surviving holder may disclaim, in whole or in part, a fractional share of the property or all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant. If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

A disclaimer is barred by a written waiver of the right to disclaim. If, before the disclaimer becomes effective, the disclaimant accepts the interest sought to be disclaimed; the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed; or a judicial sale of the interest sought to be disclaimed occurs, the disclaimer is barred. A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise. A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

207 What constitutes renunciation

An appointee under a power may disclaim or renounce a gift bestowed by its exercise but the disclaimer or renunciation must be clear and unequivocal, and it must occur within a reasonable time after the death of the donor of the power. A plain and definite renunciation of an appointment is to be distinguished from a mere equivocation or argumentative insistence that the appointee's title to the fund or property comes to him or her otherwise than under the power and is to be distinguished from a statement that the appointee elects to take under the one in preference to the other.

Renunciation must be of the whole appointed property, if any. An appointee cannot renounce the appointment as to a part of the property appointed and claim the other part directly under the donor's will.

208 Requisites under uniform disclaimer acts

A disclaimer under the applicable uniform acts must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed appropriately. Subject to particular rules for specific interests, the delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method likely to result in its receipt. If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded, or registered, the disclaimer may be so filed, recorded, or registered. Failure to file, record, or register the disclaimer does not affect

its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

209 Effect of renunciation

Where an appointee unequivocally renounces, nothing passes to him or her under the appointment. The result of renunciation is that by exercise of the power, the title is not affected but remains where it was before.

An appointment in due form to a proper person constitutes an exercise of the power, notwithstanding that he or she renounces.

210 Under uniform disclaimer acts

The uniform acts provide that except for a disclaimer of rights of survivorship in jointly held property or disclaimer of an interest by a trustee, the following rules apply to a disclaimer of an interest in property:

(1) the disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable or, if the interest arose under the law of intestate succession, as of the time of the intestate's death;
(2)the disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general;
(3)if the instrument does not contain a provision described in paragraph (2), the following rules apply:
(a) if the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution. However, if, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution;
(b) if the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist; and
(4)upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1)if the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable;
(2)if the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power; and
(3)the instrument creating the power is construed as if the power expired when the disclaimer became effective.

A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable. A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

If a fiduciary disclaims a power held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable. If a fiduciary disclaims a power held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power. A disclaimer under the applicable provision is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

A disclaimer becomes irrevocable when it is delivered or filed or when it becomes otherwise effective.

211 Indirect release by objects of power

A power of appointment is indirectly released if all objects of the power effectively transfer their potential appointive interests to the takers in default of appointment.

Comment: The rationale for the above rule is that the interest in property that an object of a power might receive under an exercise of the power is transferable, unless it is subject to a valid restraint on alienation. In order for an indirect release of a power to be accomplished under the rule, a nongeneral (special) power with objects that form a defined limited class would have to be involved. Because the donee of such a power can release the power, the same policy considerations justify the indirect release of the power by the objects of the power.

212 Special or nongeneral power

The Restatement Second provides that appointive assets covered by a nongeneral power cannot be subjected to the payment of the claims of creditors of the donee, or the expenses of administration of the donee's estate, except to the extent required by rules of law relating to fraudulent conveyances.

Where a trust beneficiary is not granted an absolute power of disposition within the meaning of a statute governing the effect of grants of such absolute powers, a judgment creditor of the beneficiary cannot levy on the beneficiary's interest in the trust estate. The settlor of an irrevocable trust, reserving to him- or herself only the right to receive, during his or her lifetime, the income from the investments and other personalty of the trust, does not have such an estate in the corpus thereof as constitutes property and rights to property subject to a lien of the United States for taxes owing by the settlor on such income.

213 Acquisition of power by donee's creditors

Creditors of a donee of a power of appointment cannot acquire the power or compel its exercise except as provided by statute, and this view has found judicial support.

Comment: The Restatement Second notes that where the donee's creditors cannot reach the appointive assets and sell them, they may attempt to acquire the power and exercise it for a money payment or, what is the same thing, compel the exercise of the power. The Restatement also points out that the rule stated above is explainable only on the ground of the common-law conception that a power is an authority and not property, even where the power created is a general one.

214 Bankruptcy

As the Restatement of Property points out, Section 541(b)(1) of the Bankruptcy Code of 1978 provides that property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.

The donee's power of appointment does not vest in or pass to the trustee in bankruptcy, or in an assignee of the trustee, and the bankruptcy statutes do not enable the trustee to make an appointment under the power.

215 Unexercised general power of appointment

An unexercised general power of appointment does not render the property subject thereto equitable assets of the donee nor make it liable for his or her debts or the debts of his or her estate, although the donee's own property is insufficient to pay them. Property subject to a donee's general power of appointment is available to the donee's creditors only if such power is exercised. In this connection, the Restatement Second of Property states that appointive assets covered by an unexercised general power of appointment, created by a person other than the donee, can be subjected to payment of claims of creditors of the donee or claims against the donee's estate, but only to the extent provided by statute.

The rationale for the rule is that a mere power of appointment is not an asset of the donee of the power and conveys no title to, or interest in, the property that is the subject thereof, and unexercised by the donee prior to his or her death, it becomes wholly inoperative. Until the donee exercises the power, he or she has not accepted control over the appointive assets that gives the donee the equivalent of ownership of them.

A court of equity, although it may aid a defective execution of a power, cannot cure the entire omission or failure to exercise the power.

216 What constitutes unexercised power

A power is "unexercised" if a purported exercise is ineffective due to the failure of the donee to comply with the required formalities of an exercise of the power. If the purported appointee of an exercise of the power is the same person that would take the appointive assets if the power is not exercised, the power is an unexercised power. A purported exercise of the power is an unexercised power.

217 Partially unexercised power

Where a power is exercised in part and unexercised in part, the general rule that an unexercised general power does not render the property subject thereto equitable assets of the donee, so as to be liable for the debts of the donee or the donee's estate, is applicable to the part that is unexercised.

218 Power created by donee

Appointive assets covered by a general power of appointment created by the donee can be subjected to the payment of the claims of creditors of the donee or claims against the donee's estate.

The general power created by the donee may be one presently exercisable or one not presently exercisable.

219 Generally

Although the principle has been vigorously assailed as unsound in theory and unfair in practice, it is established by the great weight of judicial authority that property, real or personal, which is the subject of a general power of appointment, is in equity assets for the payment of the creditors of the donee's estate if his or her own estate is insufficient to pay them, where he or she exercises the power by deed or will, or in other manner prescribed by the terms of the power itself, and appoints the property to volunteers and, in some instances, to particular creditors.

The principle, of course, presupposes that the donee possessed the power that he or she attempted to exercise. Accordingly, the rule does not apply where one who had merely the power to sell and convey the property without any purchaser being answerable for the application of the purchase money undertook to make a gift of the property and, in so doing, exceeded his or her right under the power. Moreover, some courts take the view that the exercise of

a power does not make the property part of the donee's general estate and does not subject it to the payment of his or her individual debts unless he or she manifests an intention to blend his or her own and the appointed estate.

The rule is purely an equitable rule. Because appointed property is not part of the donee's estate, it is not available in law as part of his or her estate for the payment of his or her debts. Where the donee dies indebted, having executed the power in favor of volunteers (that is, persons other than creditors), the appointed property is treated as equitable, not legal, assets of the estate, and, in the absence of a statute, if it passes to the executor at all, it does so not by virtue of his or her office, but as a matter of convenience and because he or she represents the rights of creditors.

220 Rationale or justification for rule

The reasoning and argument by which the courts have sought to justify the principle seem to rest upon the proposition that where the power is general so that the donee may appoint whomever he or she chooses, it is his or her duty, if the donee exercises the power at all, to appoint his or her creditors and that the appointment of volunteers amounts to a fraud upon his or her creditors that equity will frustrate by holding the property to be equitable assets for the payment of the donee's debts or the debts of the donee's estate, his or her exercise of the power having put the property within the grasp of the court, which, it is conceded, would have been helpless if the fraud had been perpetrated by failure to exercise the power. As to property that a person could appoint to him- or herself or his or her executors, the property could have been devoted to the payment of debts, and therefore, creditors have an equitable right to reach that property.

Comment: When the donee of a general power makes an appointment, whether by will or inter vivos, the donee exercises a dominion over the appointive assets covered by the power that is in its practical aspects identical to the dominion exercised by the donee over owned assets.

221 Manner of exercise of power; defectiveness

The principle that property, real or personal, which is the subject of a general power of appointment, is in equity assets for the payment of the creditors of the donee's estate if his or her own estate is insufficient to pay them, where the donee exercises the power by deed or will or in other manner prescribed by the terms of the power itself and appoints the property to volunteers, has been applied indiscriminately without regard to whether the power limited the means of its exercise to a deed, a will, or to a deed or will, and without regard to how it was actually exercised. The appointive assets are subject to the creditors of the donee of a general power, as long as the power is exercised notwithstanding the fact that the exercise is later determined to be defective.

222 Time of ascertaining creditors

The creditors entitled to take the property covered by a general power of appointment exercised by the donee in favor of persons other than such creditors are to be ascertained as of the date of the death of the donee, at least where the power is exercised by will.

223 Existence and necessity of fraud

The doctrine that property that is the subject of an exercised general power of appointment is, in equity, assets for the payment of the donee's debts if his or her own property is insufficient for the purpose is referred to the general power of equity to prevent fraud, it being conceived that the failure of the donee under a general power to appoint his or her own creditors, as he or she might do under a general power, is a species of fraud.

The courts, however, do not make proof of actual fraud a condition of the application of the rule, or make any distinction in this regard between the cases where there was no apparent justification for the donee's failure to protect his or her creditors and cases where, in the circumstances, he or she might fairly be supposed to recognize the superior moral claim of the volunteers whom he or she appointed.

224 Appointments to volunteers and creditors; persons claiming under appointee

The rule that appointed property is subject to the claims of the donee's creditors is commonly stated in a form that limits it to appointments of volunteers, implying that it perhaps might not apply where the appointment under the general power was made to a particular creditor or particular creditors, although there is authority to the effect that the attempt to confine the rule to volunteers cannot be supported when speaking of powers to appoint by will and that the rule extends to creditors appointed by will.

The exercise of a testamentary power of appointment by an insolvent, by will, in favor of one whom he or she has promised to reimburse for money paid for corporate stock renders the fund so appointed assets of the estate for the benefit of creditors, in which the appointee must share pro rata, although the appointment was made in accordance with a contract when the stock was sold.

225 Effect of provisions as to creditors in instrument creating power

The rule that property appointed under a general power is subject to the claims of the donee's creditors applies in spite of a provision by the donor in the instrument creating the power that the property covered thereby shall in no circumstances be appointed to the donee's creditors or subjected to their claims, and it is likewise immaterial that the donee provides in the instrument of appointment that the appointive assets shall not be subjected to the claims of the donee's creditors.

Observation: Because the primary purpose of a spendthrift trust is to prevent anticipatory alienation or attachment by creditors, the donee of a power of appointment with respect to such a trust has no authority to exercise his or her power in favor of the very group that the trust is designed to and does exclude.

226 Necessity of exhausting donee's own property

Generally, the principle that treats the property as equitable assets of the donee for the purposes of a creditor only applies where the donee's own property is insufficient to pay his or her debts. Where the power is executed, creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands. The donee's individual estate, including that which is made the subject of specific legacies or devises, must first be exhausted in the payment of a debt before the creditors can reach any part of the estate appointed.

Property passing by the exercise of a general power of appointment in the residuary clause of the will of the donee of the power cannot be used to pay expenses arising out of the administration of the testator's property, but any expenses arising out of the administration of the property subject to the power should be borne by that property.

227 Minority rule

There is some direct authority opposed to the rule that property that is subject to a general power of appointment is subject to the claims of the donee's creditors where he or she has exercised the power by appointing volunteers or, in some instances, creditors, and the rule has been disapproved by some judges and other authorities.

In jurisdictions that take the minority view that the property covered by the power of the appointment is not subject to the donee's debts, it is nevertheless the rule that the donee may appoint his or her creditors and thereby subject the property to his or her debts.

228 Generally

Appointive assets are treated as owned assets of a deceased donee in determining the rights of a surviving spouse in the owned assets of the donee if the deceased spouse was both the donor and donee of a general power of appointment that was exercisable by the donee alone, unless the controlling statute provides otherwise.

Comment: The Restatement Second notes that statutes generally give a surviving spouse a right to elect a share of the deceased spouse's estate, and that some of these statutes make it clear that the deceased spouse's estate for purposes of asserting this right of election included property over which the deceased spouse had a general power of appointment if the deceased spouse was both the donor and donee of the power, as would be the case if the deceased spouse established and funded a revocable trust. Under the rule stated above, appointive assets are not included as part of the donee's estate for purposes of the surviving spouse's right of election when the donor and donee were different persons, unless the statute provides otherwise. In this situation, the statute provides otherwise only if it expressly includes such appointive assets in the deceased spouse's estate for purposes of the right of election.

229 Surviving spouse as creditor of donee

If the surviving spouse of a donee is a creditor of the donee, the spouse as a creditor has the same rights in the appointive assets as any other creditor.